MISSISSIPPI LAW JOURNAL

ARTICLE

MISSISSIPPI JUROR AGE REQUIREMENT—UNFAIR TO THE DEFENDANT, UNFAIR TO THE YOUNG, AND UNFAIR TO THE PUBLIC—IS IT CONSTITUTIONAL?
Thomas J. Ginger and Charles M. Powers

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VOLUME 47 JANUARY 1976 NUMBER 1

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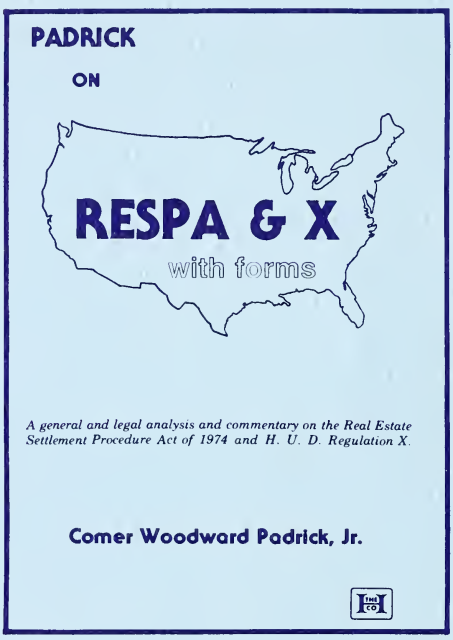
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Current subscription: $12.00 per year. Single issue, $3.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

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Second class postage paid at University, Mississippi 38677 and additional mailing offices.

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MISSISSIPPI JUROR AGE REQUIREMENT— UNFAIR TO THE DEFENDANT, UNFAIR TO THE YOUNG, AND UNFAIR TO THE PUBLIC— IS IT CONSTITUTIONAL?

Thomas J. Ginger and Charles M. Powers***

> The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, *social*, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinction and discriminations which are abhorrent to the democratic ideals of trial by jury.[1]

Mississippi's statutory age requirement for jury service,[2] like many other of its laws, has become outmoded through a combination of passage of time and legislative intransigence.[3] Mississippi remains one of a small number of states requiring grand and petit jurors to be at least 21 years of age.[4]

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** Associate Editor, *Mississippi Law Journal*.

[1] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (emphasis added) (citations omitted).

[2] MISS. CODE ANN. § 13-5-1 (1972).

[3] The recent Republican gubernatorial candidate's campaign was based, in part, on the need for a new Mississippi constitution. *E.g.*, The Commercial Appeal, Oct. 16, 1975, at 41, col. 6.

[4] MISS. CODE ANN. § 13-5-1 (1972). Eight other states set the minimum age at 21 years. *See* ALA. CODE tit. 30, § 21 (Supp. 1973); COLO. REV. STAT. ANN. § 78-1-8 (Cum. Supp. 1971); FLA. STAT. ANN. § 40.01 (1961); KAN. STAT. ANN. §§ 43-102, 140-154 (1964); MO. ANN. STAT. § 494.010 (Vernon Supp. 1975); N.J. STAT. ANN. § 2A:69-1 (Supp. 1975); R.I. GEN. LAWS ANN. § 9-9-1 (Supp. 1974); UTAH CODE ANN. § 78-46-8 (1953). The minimum age is 25 in Nebraska. NEB. REV. STAT. § 25-1601 (1964).

New Hampshire is the only state with no age qualification. N.H. REV. STAT. ANN. §§

Under Mississippi's jury selection scheme the principal source of jurors is county voter rolls,[5] which include registered 18-, 19-, and 20-

500-A:2 :19 (Supp. 1973) (determined by selectmen). The requirement in Hawaii is 20 years of age, HAWAII REV. STAT. § 609-1 (1968); in Alaska and Wyoming, it is 19, ALASKA STAT. § 09.20.010 (1973); WYO. STAT. ANN. §§ 1-77, 8-18.1 (Supp. 1975). The remaining states either provide by statute that the minimum age is 18 years or imply the minimum age is 18 years by requiring that jurors be electors or have the qualifications of electors. ARIZ. REV. STAT. ANN. § 21-201 (Supp. 1974)(electors); ARK. STAT. ANN. § 39-101 (Supp. 1973) (registered voters); CAL. CIV. PRO. CODE § 198 (West Supp. 1975)(petit jurors)(18); CAL. PENAL CODE § 893 (West Supp. 1975)(grand jurors)(18); CONN. GEN. STAT. ANN. § 51-217 (Supp. 1975)(electors); DEL. CODE ANN. tit. 10, § 4504 (1974)(qualified voters); GA. CODE ANN. § 59-106 (Supp. 1975)(registered voters); IDAHO CODE § 2-209 (Supp. 1975)(18); ILL. ANN. STAT. ch. 78, § 2 (Smith-Hurd Supp. 1975)(18); IND. ANN. STAT. § 33-4-5.5-11 (1975)(18); IOWA CODE ANN. § 607.1 (1975)(qualified electors); KY. REV. STAT. ANN. § 29.025 (Baldwin Supp. 1975)(18); LA. CODE CRIM. PRO. ANN. art. 401 (West Supp. 1975)(18); ME. REV. STAT. ANN. tit. 14, § 1211 (Supp. 1974)(18); MD. CTS. & JUD. PRO. CODE ANN. § 8-104 (1974)(18); MASS. GEN. LAWS ANN. ch. 234, § 1 (Supp. 1975) (qualified to vote, registered or not); MICH. COMP. LAWS ANN. § 600.1306 (Supp. 1975)(electors); MINN. STAT. ANN. §§ 593.04, 628.54 (Supp. 1975)(18); MONT. REV. CODES ANN. § 93-1301 (Part III, Interim Supp. 1975)(registered electors); NEV. REV. STAT. § 6.010 (1973) (qualifications of electors, registered or not); N.M. STAT. ANN. § 19-1-1 (1970)(qualified electors); N.Y. JUD. LAW §§ 504, 596, 662 (McKinney Supp. 1974)(18); N.C. GEN. STAT. § 9-3 (Supp. 1974)(18); N.D. CENT. CODE § 27-.09-.1-08 (1974) (18); OHIO REV. CODE ANN. § 2313.06 (Page 1954)(electors); OKLA. STAT. ANN. tit. 38, § 28 (Supp. 1974)(qualifications of electors); ORE. REV. STAT. § 10.030 (1973)(18); PA. STAT. tit. 17, §§ 1301.5 (minimum voting age), 1333 (18 years), 1279 (18 years) (Supp. 1975); S.C. CONST. art. 5, § 18 (qualified electors); S.D. CODE § 16-13.10 (Supp. 1975) (18); TENN. CODE ANN. § 22-101 (Supp. 1974) (18); TEX. REV. CIV. STAT. art. 2133 (Supp. 1974)(18)(petit jurors); TEX. CODE CRIM. PRO. art. 19.01 (Supp. 1974) (qualified jurors in county)(grand jurors); VT. STAT. ANN. tit. 12, App. VII, Pt. I, Rule 25 (1973)(18); VA. CODE ANN. § 8-208.2 (Supp. 1975)(18); WASH. REV. CODE ANN. § 2.36.070 (Supp. 1974)(electors); W. VA. CODE ANN. § 52-1-1 (Supp. 1975)(18); WIS. STAT. ANN. § 255.01 (1971)(electors).

[5] MISS. CODE ANN. § 13-5-8 (Supp. 1975). The great majority of the states rely upon voter registration lists as the primary source of jurors. *See* ARIZ. REV. STAT. ANN. § 21-301 (Supp. 1974); ARK. STAT. ANN. § 39-205 (Supp. 1973); COLO. REV. STAT. ANN. § 78-1-5 (Cum. Supp. 1971); CONN. GEN. STAT. ANN. § 51-221 (Supp. 1975); DEL. CODE ANN. tit. 10, §§ 4504, 4505 (1974); FLA. STAT. ANN. §§ 40.01, .02 (1961); GA. CODE ANN. § 59-106 (Supp. 1975); IDAHO CODE § 2-206 (Supp. 1975); ILL. ANN. STAT. ch. 78, § 1 (Smith-Hurd Supp. 1975); IND. ANN. STAT. § 33-4-5.5-7 (Burns 1975); IOWA CODE ANN. § 609.1 (1975); KY. REV. STAT. ANN. § 29.075 (1969); ME. REV. STAT. ANN. tit. 14, § 1254 (Supp. 1974); MD. CTS. & JUD. PRO. CODE ANN. § 8-104 (1974); MICH. COMP. LAWS ANN. § 600.1310 (Supp. 1975); MINN. STAT. ANN. §§ 593.05 (1947), .13 (Supp. 1975); MONT. REV. CODES ANN. § 93-1402 (Part III, Interim Supp. 1975); NEB. REV. STAT. § 25-1628 (1964); N.M. STAT. ANN. § 19-1-3 (Supp. 1973); N.D. CENT. CODE § 27-.09.1-05 (1974); OHIO REV. CODE ANN. § 2313.06 (Page 1954); OKLA. STAT. ANN. tit. 38, § 18 (Supp. 1974); ORE. REV. STAT. § 10.110 (1973); PA. STAT. tit. 17, §§ 942, 1252 (1962), 1301.6 (Supp. 1975)(one of sources specified); R.I. GEN. LAWS ANN. § 9-9-9 (Supp. 1974); S.C. CODE ANN. § 38-52 (Supp. 1974); S.D. CODE §§ 16-13-4, -4.1 (Supp. 1975); TEX. REV. CIV. STAT. art. 2094 (Supp. 1974); UTAH CODE ANN. § 78-46-17 (Supp. 1975); VA. CODE ANN. § 8-208.10 (Supp. 1975);

year-olds.[6] This anomalous situation of relying on registered electors as the primary source of jurors, while at the same time imposing the additional requirement that jurors be 21 years of age, is the same as that which confronted the federal judiciary after ratification of the twenty-sixth amendment.[7] Congress, however, acted quickly to correct the federal dichotomy, lowering the age for jury service to 18 in the federal system.[8]

This article is intended to demonstrate that systematic exclusion of 18-, 19-, and 20-year-olds in the Mississippi jury selection scheme[9] amounts to purposeful exclusion of all, or a significant portion, of a socially distinct group—young adults—which possesses a unique perspective, and that therefore the Mississippi Supreme Court, in the absence of corrective legislation, should utilize constitutional jury selection principles to bring this excluded group into the selection process. Not only does the present exclusion of this group deny criminal defendants constitutional rights to fair trials and impartial juries which are representative of a fair cross section of the community, it further

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WASH. REV. CODE ANN. § 2.36.060 (Supp. 1974); WYO. STAT. ANN. § 18-142.1 (Supp. 1975). A few states use voter rolls as one of several sources. *See* ALASKA STAT. § 09.20.050 (1973); MO. ANN. STAT. § 494.240 (Supp. 1975); N.Y. JUD. LAW §§ 503, 594, 658 (1968); N.C. GEN. STAT. § 9-2 (Supp. 1974); TENN. CODE ANN. § 22-228 (Supp. 1974); VT. STAT. ANN. tit. 4, § 953 (1972).

One state utilizes tax rolls as the primary source. KAN. STAT. ANN. § 43-102 (1964). In the remainder of the states, no source is specified. ALA. CODE tit. 30, § 20 (Supp. 1973); CAL. CIV. PRO. CODE § 204 (West Supp. 1975); HAWAII REV. STAT. § 609-10 (1968); LA. CODE CRIM. PRO. ANN. arts. 408, 409 (Supp. 1975); MASS. GEN. LAWS ANN. ch. 234, § 4 (Supp. 1975); NEV. REV. STAT. § 6.045 (1973); N.H. REV. STAT. ANN. §§ 500-A:2, :19 (Supp. 1973); N.J. STAT. ANN. § 2A:70-1 (Supp. 1975); W. VA. CODE ANN. § 52-1-4 (1966); WIS. STAT. ANN. § 255.04 (Supp. 1975).

[6] The twenty-sixth amendment to the United States Constitution, ratified on June 30, 1971, provides in part:

> The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

U.S. CONST. amend. XXVI, § 1. Pursuant to ratification of this amendment, Mississippi's age requirement for electors was lowered from 21 to 18. MISS. CONST. art. 12, § 241 (amended November 22, 1972).

[7] The Jury Selection and Service Act of 1968, Act of Mar. 27, 1968, Pub. L. No. 90-274, § 101, 82 Stat. 53 provided a minimum age requirement of 21 years for federal jurors, *id.* at 58, and also provided that the names of prospective jurors were to be obtained from voter registration lists or lists of actual voters within a judicial district. *Id.* at 55.

[8] 28 U.S.C. § 1865(b)(1)(Supp. III, 1973), *amending* 28 U.S.C. § 1865(b)(1)(1970). This amendment infers a belief by Congress in the correlation between voter qualifications and juror qualifications. The situation is somewhat analogous to the effect the nineteenth amendment had in qualifying women as jurors where the primary requisite for jury service was qualification as an elector. *See* 29 WASH. & LEE L. REV. 131, 133 n.9 (1972).

[9] MISS. CODE ANN. §§ 13-5-1 (1972), 13-5-12 (Supp. 1975).

shuts out from "the system" young adults, many of whom are already alienated from their elders by the "generation gap." The following discussion will examine the constitutional requirements for jury selection and demonstrate how they may be applied to end this class exclusion "abhorrent to the democratic ideals of trial by jury."[10]

I. Federal Constitutional Requirements

Any litigant seeking to challenge the makeup of a state or federal grand or petit jury must first establish his standing to raise the objection. When a litigant over 21 years of age is seeking to challenge the constitutionality of the Mississippi statute which limits jury service to persons 21 years of age and older, such a person is obviously not a member of the excluded class. On several occasions, however, the United States Supreme Court has held that a criminal defendant, who was not a member of the class which allegedly was excluded from the grand and petit juries which heard the case, has standing to challenge the systematic exclusion of the alleged class.[11] In *Taylor v. Louisiana*,[12] the Court held that a male defendant had standing to challenge the constitutionality of a Louisiana statute which excluded women from jury service unless they had previously filed written declarations of willingness to serve. In *Peters v. Kiff*,[13] the Court held that a white defendant had standing to challenge the systematic exclusion of Blacks from the grand and petit juries that heard his case. Given these two holdings, it would appear that any litigant has standing to raise substantial questions as to whether the federal constitutional rights to trial by jury and to due process of law are abridged by the methods under which the grand and petit juries were selected in his case.

While the fifth amendment right to grand jury indictment does not apply in a state prosecution,[14] "if a State chooses, quite apart from constitutional compulsion, to use a grand . . . jury, due process imposes limitations on the composition of that jury."[15] The sixth amendment

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[10] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946).

[11] Some state courts have also held that one need not be a member of the excluded class to challenge its exclusion. *E.g.*, Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964)(white civil rights worker); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (defendant who believed in God allowed to challenge exclusion of jurors who refused to state a belief in God); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870, *cert. denied*, 382 U.S. 22 (1965)(white civil rights worker allowed to challenge exclusion of Blacks).

[12] 419 U.S. 522 (1975).

[13] 407 U.S. 493 (1972). *See also* Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946)(nonconstitutional decision; exercise of supervisory power over federal courts only).

[14] Hurtado v. California, 110 U.S. 516 (1884).

[15] Peters v. Kiff, 407 U.S. 493, 501 (1972)(plurality opinion).

right to a petit jury in criminal cases is made applicable to the states through the due process clause of the fourteenth amendment.[16] The result is that the principles applicable to the composition of jury venires are essentially the same for grand and petit juries,[17] and for state and federal cases.[18]

A. The Substantial Cross Section Rule

Almost a century ago the United States Supreme Court held that convictions based on state *statutes* which systematically excluded Blacks from jury service were constitutionally invalid.[19] Since then, the Court has reversed numerous convictions because of proven racially discriminatory jury selection *practices* by state officials[20] and has devel-

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[16] Duncan v. Louisiana, 391 U.S. 145 (1968).

[17] *See* Alexander v. Louisiana, 405 U.S. 625, 626 n.3 (1973); Carter v. Jury Comm'n, 396 U.S. 320 (1970); A. GINGER, JURY SELECTION IN CRIMINAL TRIALS § 3.39 (1975).

[18] *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975); Carter v. Jury Comm'n, 396 U.S. 320, 330 (1970); Duncan v. Louisiana, 391 U.S. 145, 158 n.30 (1968); A. GINGER, *supra* note 17, § 3.38.

[19] After passage of the Reconstruction Amendments, the Supreme Court first reversed on equal protection grounds the conviction of a Black because a state statute limited jury service to whites. Strauder v. West Virginia, 100 U.S. 303 (1880). *See also* Neal v. Delaware, 103 U.S. 370 (1881); *Ex parte* Virginia, 100 U.S. 339 (1880).

[20] Peters v. Kiff, 407 U.S. 493 (1972); Alexander v. Louisiana, 405 U.S. 625 (1972); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Coleman v. Alabama, 389 U.S. 22 (1967); Arnold v. North Carolina, 376 U.S. 773 (1964); Eubanks v. Louisiana, 356 U.S. 584 (1958); Reece v. Georgia, 380 U.S. 85 (1955); Hernandez v. Texas, 347 U.S. 475 (1954); Cassell v. Texas, 339 U.S. 282 (1950); Patton v. Mississippi, 332 U.S. 463 (1947); Akins v. Texas, 325 U.S. 398 (1945); Hill v. Texas, 316 U.S. 400 (1942); Smith v. Texas, 311 U.S. 128 (1940); Pierce v. Louisiana, 306 U.S. 354 (1939); Hale v. Kentucky, 303 U.S. 613 (1938); Norris v. Alabama, 294 U.S. 587 (1935); Martin v. Texas, 200 U.S. 316 (1906); Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900) (first conviction reversed due to racial discrimination in selection of grand jury); Gibson v. Mississippi, 162 U.S. 565 (1896); T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 1810 (3d ed. 1967), 162-71 (2d Supp. 1973). *See also* Note, *The Jury: A Reflection of the Prejudices of the Community*, 20 HASTINGS L.J. 1417 (1969)(current problems in de facto discrimination); Comment, *"Jury-mandering": Federal Jury Selection and the Generation Gap*, 59 IOWA L. REV. 401, 403-05 (1973).

Convictions have been reversed for violation of the fifth amendment due process clause, for violation of the fourteenth amendment equal protection clause, and for violation of the sixth amendment right to a jury trial. In addition, when necessary and deemed advisable, the Court has extended various provisions of the first ten amendments to the states through the due process clause of the fourteenth amendment.

The distinction the Court has drawn between the meanings of the various constitutional provisions used in these cases is not always clear:

> A Black defendant complaining about the systematic exclusion of blacks won under the equal protection clause. A white complaining about the same

oped a clear rule that grand and petit juries must be chosen from panels or venires which are made up of a representative cross section of the community.[21]

This requirement is now codified in federal[22] and Mississippi statutes.[23] The House committee report on the Jury Selection Act of 1968 explains why this declaration of policy was felt to be necessary:

> [I]t must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding. As long as there are significant departures from the cross-sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.[24]

Although the "substantial cross-section" requirement has been accepted, its application "has been somewhat vague.[25] Courts have generally contented themselves with "a visceral assessment of fairness."[26] Since "[a] fair trial in a fair tribunal is a basic requirement of due process,"[27] courts have traditionally held that the due process clauses of the federal and state constitutions protect a defendant from jurors who are incapable of rendering an impartial verdict based on the evidence and the law. Thus a defendant cannot, consistent with due process, be subjected to trial by an insane juror,[28] by jurors who are intimidated by the threat of mob violence,[29] or by jurors who have formed a fixed opinion about the case from newspaper publicity.[30]

> kind of exclusion won under the due process clause. A black, complaining about the prohibition against questioning jurors concerning racial prejudice in order to make meaningful challenges, won under the due process clause.

Ginger, *Due Process in Practice or Whatever's Fair*, 25 HASTINGS L.J. 897, 934 (1974)(citations omitted).

[21] Taylor v. Louisiana, 419 U.S. 522 (1975); *see, e.g.*, Peters v. Kiff, 407 U.S. 493 (1972); Apodaca v. Oregon, 406 U.S. 404 (1970)(plurality opinion); Williams v. Florida, 399 U.S. 78 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Brown v. Allen, 344 U.S. 443 (1953); Fay v. New York, 332 U.S. 261, 299-300 (1947) (dissenting opinion); Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60 (1942); Smith v. Texas, 311 U.S. 128 (1940).

[22] 28 U.S.C. § 1861 (1970).

[23] MISS. CODE ANN. § 13-5-2 (Supp. 1975).

[24] H.R. REP. No. 1076, 90th Cong., 2d Sess. 8 (1968) in U.S. CODE CONG. & AD. NEWS 1797 (1968).

[25] Comment, *supra* note 20, at 403.

[26] *Id.* at 404. *See also* Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study*, 10 AM. CRIM. L. REV. 771, 776, 779, 785 (1972).

[27] *In re* Murchison, 349 U.S. 133, 136 (1955).

[28] Jordon v. Massachusetts, 225 U.S. 167, 176 (1912).

[29] Moore v. Dempsey, 261 U.S. 86 (1923).

[30] Irvin v. Dowd, 366 U.S. 717 (1961).

However, because "[t]he right to a trial by an impartial jury is . . . the foundation of our form of government and wholly foreign to totalitarianism,"[31] courts have also held that due process is denied by circumstances that create the likelihood or appearance of bias.[32] Specifically, where the jury selection procedures are illegal and unconstitutional, doubt is cast "on the integrity of the whole judicial process."[33]

Grand and petit jury venires made up of a substantial cross section of the community are of great importance in preventing even the appearance of bias in the judicial process:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[34]

Where the "substantial cross-section" requirement has not been met, proof of actual harm is not required.[35] This federal constitutional requirement, however,

> does not augur or authorize the fashioning of detailed jury selection codes by the federal courts. The fair cross-section principle must have much leeway in application. The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions *so long as it may be fairly said that the jury lists or panels are representative of the community*.[36]

For example, states may continue to grant exemption from jury service to persons in case of special hardship or incapacity and to those engaged in occupations the uninterrupted performance of which is critical to the community's welfare.[37]

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[31] Adams v. State, 220 Miss. 812, 72 So. 2d 211, 213 (1954).

[32] *In re* Murchison, 349 U.S. 133, 136 (1955); *see, e.g.*, Tumery v. Ohio, 273 U.S. 510 (1927)(due process denied where judge-factfinder had a pecuniary interest in the outcome of the case before him).

[33] Peters v. Kiff, 407 U.S. 493, 502 (1972)(plurality opinion).

[34] *Id.* at 503-04 (1972)(plurality opinion), *quoted with approval in* Taylor v. Louisiana, 419 U.S. 522, 532 (1975).

[35] Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972)(plurality opinion); Thiel v. Southern Pac. Co., 328 U.S. 217, 225 (1946) (nonconstitutional decision, exercise of supervisory power over federal courts only).

[36] Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (emphasis added).

[37] Rawlins v. Georgia, 201 U.S. 638 (1906).

B. *Showing Violation of the "Substantial Cross Section" Rule*

In order to make out a prima facie case of discrimination in the composition of grand and petit jury venires, a defendant has the burden of showing (1) systematic exclusion of (2) a cognizable class, or distinct group, within the population. Once the defendant has made his prima facie case, the burden of proof is shifted to the government to demonstrate that the disparity between the percentage of members of the distinct group in the general population and the percentage of the members of the group on grand and petit jury venires is not the product of systematic discrimination.[38] Furthermore, it has been asserted that "underrepresentation of the more *sociologically* distinct groups in our country necessitates a more compelling demonstration by the government to overcome the inference of discrimination."[39] Classifications which have the following bases have been held to be judicially cognizable:[40] Race;[41] economic, occupational or social status;[42] religious beliefs;[43] sex;[44] political beliefs or values;[45] age;[46] and geography.[47]

II. YOUTH AS A JUDICIALLY COGNIZABLE CLASS

Is there a sufficiently cognizable youth group whose exclusion or substantial underrepresentation will enable a defendant to establish a prima facie case? To answer this question, a test to determine youth

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[38] *E.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Hernandez v. Texas, 347 U.S. 475 (1954); Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 375, at 23-25 (1969); Kairys, *supra* note 26, at 777-80; Comment, *supra* note 20, at 406-07.

[39] United States v. Butera, 420 F.2d 564, 569 (1st Cir. 1970)(emphasis added).

[40] *See* Kairys, *supra* note 26, at 780-81.

[41] See note 20 *supra*.

[42] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); Witcher v. Peyton, 405 F.2d 725, 727 (4th Cir. 1969) (dictum); Labat v. Bennett, 365 F.2d 698, 719-27 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967); United States *ex rel.* Geralds v. Deegan, 307 F. Supp. 56 (S.D.N.Y. 1969); Michigan v. Viera, Nos. A-152-598 & A-152-697 (Recorder's Court of the City of Detroit, April 13, 1970), *cited in* Kairys, *supra* note 26 at 781 n.57.

[43] State v. Madison, 240 Md. 265, 213 A.2d 880 (1965); Juarez v. State, 102 Tex. Crim. 297, 277 S.W. 1091 (1925); State v. Holmstrom, 43 Wis. 465, 168 N.W.2d 574 (1969)(dictum).

[44] Taylor v. Louisiana, 419 U.S. 522 (1975).

[45] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946)(dictum); Simmons v. Jones, 317 F. Supp. 397 (S.D. Ga. 1970), *rev'd on other grounds*, 478 F.2d 321 (5th Cir. 1973); State v. Holmstrom, 43 Wis. 465, 168 N.W.2d 574 (1969)(dictum).

[46] United States v. Butera, 420 F.2d 564 (1st Cir. 1970); State v. Holmstrom, 43 Wis. 465, 168 N.W.2d 574 (1969); *see* Simmons v. Jones, 317 F. Supp. 397 (S.D. Ga. 1970), *rev'd on other grounds*, 478 F.2d 321 (5th Cir. 1973)(persons over 65 overrepresented).

[47] Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946)(dictum); State v. Holmstrom, 43 Wis. 465, 168 N.W.2d 574 (1969) (dictum).

cognizability must be articulated.[48] One such test was formulated by a California Court of Appeals in *People v. Johnson*:[49]

> The exclusion of a "substantial and identifiable class of citizens" renders the jury selection system arbitrary and discriminatory . . . . The test is whether the exclusion of the class would "remove from the jury room qualities of human nature and varieties of human experience," and deprive the jury "of a perspective on human events that may have unsuspected importance. . . ." (Peters v. Kiff, *supra*, 407 U.S. 493, 503-504 . . . [1972]). Another test is whether the group excluded is "fungible" with the jury panel, whether "a community made up exclusively of one is different from a community composed of both" (Ballard v. United States, 329 U.S. 187, 193-194 . . . [1948]).
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> Whether exclusion of a certain age group or economic group is erroneous is difficult to determine. . . . In order to rely on the exclusion of an age or economic unit from jury service as a challenge to the jury, the defendant should show exclusion of that group will remove from the jury significant qualities, and deprive it of important perspectives. He does not, of course, have to demonstrate actual prejudice.[50]

According to *United States v. Guzman*,[51] a case decided by the United States District Court for the Southern District of New York, however, a different and more stringent test must be satisfied. First, the group must have a "definite composition," that is, its members cannot be arbitrarily chosen;[52] next, members must have common "attitudes or ideas or experience" particular to the group;[53] and finally, exclusion of the group must jeopardize the impartiality of the jury in cases involving group members, that is, the interests common to the group cannot be sufficiently "protected" by nonmembers.[54]

The *Guzman* standards impose an unrealistic burden on defendants seeking to challenge exclusion of young people from the jury selection process[55] and neglect to take judicial precedents into account. The "defi-

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[48] The Supreme Court has not ruled on the cognizability of young people. However, in Hamling v. United States, 418 U.S. 87, 137 (1974), the Court assumed, without deciding, that the young are a cognizable class.

[49] 38 Cal. App. 3d 228, 113 Cal. Rptr. 303 (4th Dist. Ct. App. 1974) (citations omitted).

[50] *Id.* at 241-42 n.5, 113 Cal. Rptr. at 312-13 n.5; *see* United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970).

[51] 337 F. Supp. 140 (S.D.N.Y.), *aff'd on other grounds*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

[52] 337 F. Supp. at 143.

[53] *Id.*

[54] *Id.* at 143-44; *accord*, United States v. Quinn, 364 F. Supp. 432, 436 (N.D. Ga. 1973); *see* United States v. Deardorff, 343 F. Supp. 1033, 1043 (S.D.N.Y. 1971); United States v. Waddy, 340 F. Supp. 509, 513 (S.D.N.Y. 1971).

[55] We cannot allow the requirement of a "distinct" group to be applied so

nite composition" requirement fails to distinguish the arbitrariness in defining other admittedly cognizable classes, such as economic groups.[56] Likewise, no "similarity in attitudes" was required of women by the Supreme Court in *Ballard v. United States*:[57]

> The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class. But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded.[58]

This logic is applicable as well to a comparison of the young with the old.[59] Any requirement of showing prejudice to permit a challenge to the jury selection system based on exclusion of a class also has been abrogated by the Supreme Court.[60] Moreover, while it may be true that older jurors may "protect" the *interests* of youth, it does not follow that the older jurors will share a younger person's *point of view*.[61]

> stringently with regard to age grouping that possible discrimination against a large class of persons . . . will be insulated from attack.

United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970); *see* Robson v. Grand Trunk W.R.R., 5 Mich. App. 90, 145 N.W.2d 846, 849 (1966); State v. Holmstrom, 43 Wis. 465, 168 N.W.2d 574, 578 (1969). *Contra*, People v. Redwine, 50 Mich. App. 593, 213 N.W.2d 841, 843 (1973) (no age group can be a cognizable class).

[56] *See, e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); United States v. Cohen, 275 F. Supp. 724, 740-42 (D. Md. 1967), *aff'd sub nom.*, United States v. DiTommaso, 405 F.2d 385 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969).

[57] 329 U.S. 187 (1946)(nonconstitutional decision, exercise of supervisory powers over federal courts).

[58] *Id.* at 193-94 (footnotes omitted), *quoted with approval in* Taylor v. Louisiana, 419 U.S. 522, 531-32 (1975); *see* Peters v. Kiff, 407 U.S. 493, 503-04 (1972) ("not necessary to assume the excluded group will consistently vote as a class"); United States v. Sinclair, No. 44375 (E.D. Mich. 1971)(unreported)(members of class not required to "exemplify all . . . traits of characteristics of the class"), *quoted in* A. GINGER, *supra* note 17, § 3.67, at 176; *cf.* 19 WAYNE L. REV. 1287, 1295-96 (1973).

[59] 19 WAYNE L. REV. 1287, 1294 (1973).

[60] See note 13 & accompanying text *supra*.

[61] Brief of Respondent, People v. Pinell, 43 Cal. App. 3d 627, 117 Cal. Rptr. 913

For the above reasons it seems apparent that the proper test for determining cognizability of the young is that stated by the California court.[62] Thus the inquiry becomes whether young people have such significantly different personal qualities and such a significantly different range of experiences that to exclude them systematically from the jury selection process results in juries being deprived of subtle, but important, points of view.[63]

To state that throughout history society has recognized the young as a distinct group is only to state the obvious.[64] Equally obvious, as pointed out by the United States Court of Appeals for the First Circuit in *United States v. Butera*,[65] is the concern in this country with a "generation gap" caused by conflicting values of the young and the old.[66] It is precisely these conflicting values which give young people the significantly different quality that sets them apart from their elders.

Before discussing the changing values and attitudes which distinguish the young from the old, it should be emphasized that these values and attitudes are shared by the young in all segments of society. A 1973 Daniel Yankelovitch national survey[67] [Yankelovitch Survey] of college and noncollege young people between the ages of 16 and 25 revealed that today young workers and students share many of the values and attitudes toward institutions, sex, and work which originated on college campuses during the 1960's.[68] A similar conclusion was reached in a 1972 Department of Health, Education, and Welfare report, *Work in America*.[69]

(1st Dist. Ct. App. 1974), *cert. denied*, 95 S. Ct. 2628 (1975), *quoted in* A. GINGER, *supra* note 17, § 3.66, at 174-75 (testimony of prosecution's expert).

[62] People v. Johnson, 38 Cal. App. 3d 228, 241-42 n.5, 113 Cal. Rptr. 303, 312-13 n.5 (4th Dist. Ct. App. 1974).

[63] *Id.*

[64] *See, e.g.*, *Job* 32:6, "I am young and ye are very old; wherefore I was afraid and durst not allow you mine opinion."

[65] 420 F.2d 564 (1st Cir. 1970).

[66] *Id.* at 570. "[T]here are many attitudes toward life and government in which it is commonly thought that younger people generally differ from older people." United States v. Dellinger, 472 F.2d 340, 365-66 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); *see* Comment, *supra* note 20, at 417-18.

[67] "[I]n cases where 'age' is asserted to demark a cognizable class, courts have evaluated prejudice in a national rather than a local environment." Gewin, *An Analysis of Jury Selection Decisions*, appendix to Foster v. Sparks, 506 F.2d 805, 820 (5th Cir. 1975)(footnote omitted).

[68] *Changing Attitudes of Youth on Sex, Patriotism, Work*, 76-2 U.S. NEWS & WORLD REPORT, June 3, 1974, at 67. "If there is any single pattern that underlies its findings, the Yankelovitch report said, it is the transmission of new social values from the campus to mainstream American youth." *Id.*

[69] *The Young Worker and the Work Ethic*, 62 TODAY'S EDUCATION, April 24, 1973, at 23-25 (article is adapted from the report).

What are the values and attitudes shared by America's youth which separate them as a group distinct from older adults? They are an interrelated complex of values and attitudes[70] toward institutions, drugs, sex, and work, characterized by tolerance[71] and humanistic concern,[72] and colored by youthful idealism.[73] The open-minded, tolerant attitude of this group is reflected in a nationwide 1972 Gallup poll of college and noncollege, black and white, liberal and conservative young people aged 16 to 29.[74] More than 80 percent of those polled felt that "both liberal and conservative viewpoints should be presented" by high schools and colleges when dealing with political issues and social problems.[75] A majority also agreed that colleges should strive to balance the number of conservative and liberal professors in the social sciences.[76]

Young adults indicate serious concern with both political and business institutions. For example, the Yankelovitch Survey found that 61 percent of college youth and 64 percent of noncollege youth believed that political parties need major reform.[77] Similarly, an "overwhelming majority" felt that business is too profit-oriented and too unconcerned with public responsibilities, with 54 percent of college youth and 45 percent of noncollege youth concluding that big business needs major reform.[78] This support for reform is derived from the humanistic concern of the

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> It would be a mistake to believe that the new attitudes toward authority and the meaning of work are limited to hippies. Judson Gooding writes that young managers, both graduates of business schools and executive trainees, "reflect the passionate concerns of youth in the 1970's—for individuality, openness, humanism, concern, and change—and they are determined to be heard."

Id. at 24; *see* Faltermayer, *Youth After the Revolution*, 87 FORTUNE, Mar. 1973, at 158; Starr, *Color the New Generation Very Light Green*, 91 FORTUNE, Apr. 1975, at 180; *cf.* Keniston, *Alienation and American Society*, in THE SOCIOLOGY OF YOUTH: EVOLUTION AND REVOLUTION 244 (H. Silverstein ed. 1973). *See generally* Keniston, *Youth: A "New" Stage of Life*, in THE PROSPECT OF YOUTH 20 (T. Cottle ed. 1972).

[70] *See* Bensonan, *American Youth and the Class Structure*, in THE SOCIOLOGY OF YOUTH: EVOLUTION AND REVOLUTION 62 (H. Silverstein ed. 1973).

[71] Faltermayer, *supra* note 69, at 145-46, 148; *see Change yes—Upheaval no*, 70-1 LIFE, Jan. 8, 1971, at 22-30.

[72] M. LYSTAD, AS THEY SEE IT 3-6 (1973). *See also* Faltermayer, *supra* note 69, at 129-38.

[73] *See* Davis, *The Sociology of Parent-Youth Conflict*, in THE SOCIOLOGY OF YOUTH: EVOLUTION AND REVOLUTION 90-92 (H. Silverstein ed. 1973).

[74] Gallup, *What Young Americans Believe—and Why*, 101 READER'S DIGEST, Sept. 1972, at 78.

[75] *Id.* at 82.

[76] *Id.*

[77] *Changing Attitudes of Youth on Sex, Patriotism, Work, supra* note 68, at 66.

[78] *Id.* In the Gallup poll, a mere 27 percent gave business a "highly favorable" rating, and 40 percent favored stricter government control on business. Even more, 57 percent, favored more government control on unions. Gallup, *supra* note 74, at 80.

young; they feel institutions must be made more responsive to the needs of the people.[79]

Evidence of the young's humanistic concern is found in a 1971 Louis Harris & Associates poll [Harris poll], where 58 percent of the young people polled answered "yes" when asked whether there should be a law requiring hiring of minorities.[80] Further evidence is revealed in the Gallup poll, where a majority of the respondents favored a mandatory year of public service by males "either in the armed forces or in such public-service areas as conservation, hospital work, VISTA, [and] the Peace Corps."[81]

Another area where young people's concern for mankind surfaces is ecology. In the Harris poll, 90 percent agreed with imposing legal sanctions against air and water polluters,[82] and in another poll, 91 percent named "the environment" as one of the country's two greatest national priorities.[83] A final indicator of the young's humanitarian concern is the finding in the 1972 Gallup poll that 56 percent favored a cut in military spending,[84] presumably to divert these funds to human needs.

Young adults' attitudes regarding sex and sex roles are intertwined with their overall tolerant outlook. The young are much more tolerant of so-called "deviant" sexual behavior than past generations, as witnessed by the open operation of "gay" organizations at many colleges.[85] Young people's belief in sexual freedom is also documented by their responses in the national polls. One significant response in the Harris poll was that 75 percent of those questioned replied that they had never seen a movie whose explicit sex offended them.[86] In the Yankelovitch

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[79] [R]ich or poor, educated or uneducated, white collar or blue collar, young Americans today expect more from the system than has any generation in the past.

Specifically, they tend to believe that America's institutions must make active and conscious efforts to enable every citizen to attain as high a level of physical, intellectual, and cultural well-being as possible.

Starr, *supra* note 69, at 180; *see* M. LYSTAD, *supra*, note 72, at 4; *The Young Worker and the Work Ethic, supra* note 69, at 25.

[80] *Change yes—Upheaval no, supra* note 71, at 25 (national cross section of 15- to 21-year-olds).

[81] Gallup, *supra* note 74, at 80.

[82] *Change yes—Upheaval no, supra* note 71, at 25. Seventy percent stated they would not work for a company that causes substantial pollution. *Id.* at 24.

[83] Fagan, *How Does Youth Think?*, 24 NAT'L REV., Sept. 15, 1972, at 1012 (poll of 2000 students in 30 colleges scientifically designed to form a representative profile of youth as a whole).

[84] Gallup, *supra* note 74, at 79.

[85] Faltermayer, *supra* note 69, at 146.

[86] *Change yes—Upheaval no, supra* note 71, at 27. The implications of having people with such views as jurors in obscenity cases are obvious. *See* Hamling v. United States, 418 U.S. 87, 136 n.20 (1974).

Survey, 61 percent of college youth and 47 percent of noncollege youth indicated that they support wider acceptance of sexual freedom.[87] Seventy-one percent of those interviewed in the Harris poll also disapproved of a "double standard" of sexual behavior.[88]

Other questions in the Harris poll revealed that 77 percent favored teaching sex education in schools[89] and that 62 percent felt that couples should be able to divorce simply if they are unhappy together.[90] These two responses seem interrelated with young people's views on another traditional institution, the church. In the Yankelovitch Survey, only 28 percent of college youth, and 42 percent of noncollege youth, answered affirmatively when asked whether "religion is a very important value."[91]

The young's attitudes toward work also differ significantly from those of the older generation, and again, these attitudes are interrelated with young people's concern for human needs. The Department of Health, Education, and Welfare [HEW] has found that young workers place more emphasis than older workers on interesting work and self-fulfillment; the converse is true with regard to job security and the quantity of work required.[92] This difference in attitudes between young and old workers surely stems, at least in part, from the young's view on the potential rewards of work. In the Yankelovitch Survey, less than half the college youth, 44 percent, and only slightly more than half the noncollege youth, 56 percent, indicated a belief that hard work always pays off.[93]

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[87] *Changing Attitudes of Youth on Sex, Patriotism, Work, supra* note 68, at 66. The findings indicate that

> the young Americans who pioneered a sexual revolution in the 1960's are even more committed today to sexual freedoms. Support for more open attitudes on sex has spread from the campus into the community of the young non-collegians.

Id.

In the Harris poll, 53 percent of the college students and 40 percent of all respondents voiced approval of sex for its own sake. *Change yes—Upheaval no, supra* note 71, at 27. Here again, the implications of including this group on juries in criminal cases based on sexual deviancy laws are clear.

[88] *Change yes—Upheaval no, supra* note 71, at 27.

[89] *Id.*

[90] *Id.*

[91] *Changing Attitudes of Youth on Sex, Patriotism, Work, supra* note 68, at 66. Also germane to young people's views on religion is the response to the question of whether "living a clean moral life is a very important value." A mere 34 percent of college youth, and a slight majority, 57 percent, of noncollege youth answered "yes." *Id.*

[92] *The Young Worker and the Work Ethic, supra* note 69, at 24; *see* Starr, *supra* note 69, at 175; *Change yes—Upheaval no, supra* note 71, at 24; *Changing Attitudes of Youth on Sex, Patriotism, Work, supra* note 68, at 66.

[93] *Changing Attitudes of Youth on Sex, Patriotism, Work, supra* note 68, at 66.

Probably the most significant difference in attitudes between the young and the old, at least as far as criminal defendants are concerned, are those regarding drugs and those regarding law enforcement officers.[94] Polls have shown that young people have little respect for policemen[95] and are much more skeptical than their elders of the propriety of law enforcement officers' actions.[96]

The use of drugs by the young has become a matter of common knowledge; such use is endemic, cutting across social and political lines. For example, a 1973 survey at a community college characterized as "the epitome of a 'straight' institution" disclosed that, although a majority of the students supported Richard M. Nixon in the 1972 Presidential election, 75 percent acknowledged having tried marijuana.[97] More broadly based polls indicate the extent of marijuana use among the young. In a Gallup poll of 1063 students at 61 campuses, 42 percent of the respondents indicated they had experimented with marijuana.[98] Almost identical results were obtained in a poll conducted for the National Commission on Marijuana and Drug Abuse. That poll was based on 2405 interviews designed to be representative of all youth; of respondents age 18 to 25, 39 percent reported having used marijuana.[99]

Obviously, many young people who have not tried marijuana and other drugs know persons who have. The following response from the Harris polls is illustrative.[100]

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[94] Statistics for 1973 reveal that over 90 percent of persons charged with narcotic drug law violations were under age 30. FBI UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES 1973, Table 30 at 128-29 (1974). For the same year the under-30 group accounted for less than 37 percent of drunk driving charges and less than 30 percent of drunkeness arrests. *Id.*

These figures take on added meaning in light of the fact that waiver of the right to jury trial is most frequent in narcotics law cases due to the often harsh jury verdicts in such cases. On the other hand, juries generally believe that laws relating to drunkenness are excessively stringent. H. KALVERN & H. ZEISEL, THE AMERICAN JURY 287, 293-96 (1966). This divergence can be explained as possible age bias on the part of jurors, whose attitudes toward their drug of choice, alcohol, are reflected in their treatment of alcohol-related offenses. 29 WASH. & LEE L. REV. 131, 135 (1972).

[95] CENTER FOR YOUTH DEVELOPMENT AND RESEARCH, UNIVERSITY OF MINNESOTA, YOUTH RESPONDS TO SOCIAL SYSTEMS 28 (Seminar Series No. 2, Aug. 1971).

[96] Chevigny, *The Attica Cases: A Successful Jury Challenge in a Northern City*, 11 CRIM. LAW BULL. 157, 170 (1975).

[97] Faltermayer, *supra* note 69, at 145.

[98] *Drugs on Campus*, 77-1 NEWSWEEK, Jan. 25, 1971, at 52.

[99] NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, (Dept. of Justice), SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, Table 3.3, at 166 (1973).

[100] *Change yes—Upheaval no, supra* note 71, at 26.

Do you personally know anyone who has used:

	High School		College	
Marijuana?	yes	62%	yes	83%
Amphetamines?	yes	41	yes	62
LSD?	yes	35	yes	57
Heroin?	yes	19	yes	35

Not surprisingly, then, the polls also show that greater numbers of young people support decreasing penalties for use or possession of marijuana,[101] or legalization of the drug, than the populace at large.[102]

When the complex of values and attitudes of young adults are considered as a whole, it certainly seems apparent that young adults are a social class distinct from their elders. Given the divergent qualities of the two groups, it is hardly realistic to describe the groups as "fungible."[103] There is, at least, some subtle difference in their viewpoints; to exclude young adults from the jury selection process surely deprives juries of one important perspective.[104]

A. Exclusion of the 18- to 21-Year-Old Group

Though "youth" is a group distinct from older adults, the question here is whether young people aged 18 to 21 are a sufficiently distinct age subgroup to warrant legal cognizability, so that their "purposeful" exclusion from the jury selection process[105] by section 13-5-1 of the 1972

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[101] Fifty-three percent of those aged 18 to 20 and 42 percent of those aged 21 to 29 suggest decreasing penalties, while only 18 percent of those aged 50 and over, and only 31 percent of those aged 30 to 49 favor decreased penalties. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, *supra* note 99, Table 2.61, at 159.

[102] Forty-three percent of the 18 to 20 and 26 percent of the 21 to 29 age group favor legalization, as compared to a mere 6 percent of the 50 and over group, and only 13 percent of the 30 to 49 group. *Id.* Table 2.56, at 157.

[103] Clearly "a community made up exclusively of one is different from a community composed of both." Ballard v. United States, 329 U.S. 187, 193 (1946).

[104] *See* 19 WAYNE L. REV. 1287, 1296 (1973). *See also* Chevigny, *supra* note 96, at 170; Comment, *supra* note 20, at 418-19; 29 WASH. & LEE L. REV. 131, 135 (1972).

[105] That such exclusion was systematic and deliberate cannot be denied. It was mandated by the Legislature in Code of Civil Procedure section 198 which provides that a person, to be competent to act as a juror, must be of the age of 21 years.

People v. Hoiland, 22 Cal. App. 3d 530, 534, 99 Cal. Rptr. 523, 526 (2d Dist. Ct. App. 1971)(footnote omitted). A long line of federal cases has held that the exclusion of different age groups by the periodic refilling of master jury wheels is not deliberate exclusion. The Federal Jury Selection and Service Act provides that master jury wheels are not required to be refilled more often than every 4 years. 28 U.S.C. § 1863(b)(4)(Supp. III, 1973). Due to this periodic refilling, persons reaching the age for jury service during the interim will not be included in the master wheel. *E.g.*, Hamling v. United States, 418 U.S. 87, 137-38

Mississippi Code[106] violates a criminal defendant's sixth amendment fundamental right to a jury selected from a representative cross section of the community.[107] An alternative query is whether the "youth" group composed of those aged 18 to 30 is a legally cognizable group which is substantially underrepresented[108] in violation of a criminal defendant's same fundamental right by the exclusion of 18- to 21-year-old group members under section 13-15-1.[109]

It is not clear whether the issue of age group cognizability is a question of fact or a matter which may be judicially noticed.[110] However,

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(1974); United States v. Owen, 492 F.2d 1100, 1109 (5th Cir.), *cert. denied*, 418 U.S. 903 (1974); United States v. Ream, 491 F.2d 1243, 1245-46 (5th Cir. 1974); United States v. Gooding, 473 F.2d 425, 430 (5th Cir.), *cert. denied*, 412 U.S. 928 (1973); United States v. Blair, 470 F.2d 331, 334-37 (5th Cir.), *cert. denied*, 411 U.S. 908 (1973); Chase v. United States, 468 F.2d 141, 145-46 (7th Cir. 1972); United States v. Guzman, 468 F.2d 1245, 1248-49 (2d Cir.), *cert. denied*, 410 U.S. 937 (1972); United States v. Pentado, 463 F.2d 355, 359 (5th Cir.), *cert. denied*, 409 U.S. 1079 (1972); United States v. Kuhn, 441 F.2d 179, 181 (5th Cir. 1971); United States v. Kronke, 321 F. Supp. 913, 915-16 (D. Minn. 1970).

This is a different situation than that in Mississippi, where the master jury lists are updated annually. MISS. CODE ANN. § 13-5-8 (Supp. 1975).

Claims of systematic exclusion or underrepresentation have been rejected in other situations where no purposeful exclusion was found. *E.g.*, United States v. DiTommaso, 405 F.2d 385, 387-89 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969) (no purposeful discrimination by clerk and jury commissioner); King v. United States, 346 F.2d 123, 124-25 (1st Cir. 1965)(same); State v. Taylor, 109 Ariz. 267, 508 P.2d 731, 735 (1973)(6-month delay in updating juror lists after ratification of twenty-sixth amendment); People v. Pinell, 43 Cal. App. 3d 627, 634-35, 117 Cal. Rptr. 913, 918-19 (1st Dist. Ct. App. 1974), *cert. denied*, 95 S. Ct. 2628 (1975) (no purposeful exclusion by jury selectors); *see* People v. Wright, 23 Ill. App. 3d 43, 318 N.E.2d 102, 105 (1974) (reasonable delay in updating jurors lists after ratification of the twenty-sixth amendment); State v. Bagget, 292 So. 2d 201, 203-04 (La. 1974) (use of voter rolls as juror source list); *cf.* United States v. Dellinger, 472 F.2d 340, 365-66 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973) (same); Brown v. State, 58 Wis. 2d 158, 205 N.W.2d 566, 573 (1973) (reasonable delay in updating juror lists after ratification of the twenty-sixth amendment).

[106] MISS. CODE ANN. § 13-5-1 (1972), provides in applicable part:

> Every citizen not under the age of twenty-one years, who is either a qualified elector, or a resident freeholder of the county for more than one year, is able to read and write, and has not been convicted of an infamous crime, or the unlawful sale of intoxicating liquors within a period of five years and who is not a common gambler or habitual drunkard, is a competent juror.

See also id. § 13-5-12 (Supp. 1975).

[107] *See* Taylor v. Louisiana, 419 U.S. 522, 526-30 (1975); Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Irvin v. Dowd, 366 U.S. 717, 722 (1961); Comment, *supra* note 20, at 418.

[108] See notes 55 through 74 and accompanying text *supra*.

[109] See note 106 *supra*.

[110] *Compare* Chevigny, *supra* note 96, at 169-70 *and* Gewin, *supra* note 67, at 819-20, *with* 19 WAYNE L. REV. 1287, 1296 n.46 (1973).

most courts which have considered and rejected claims of age group cognizability have based such rejections on failure of proof,[111] indicating that they consider the issue a question of fact. Since the issue generally has been treated as a factual question, expert testimony by sociologists and statisticians appears to be the obvious mode of proof of cognizability.[112]

Proof by expert testimony was the approach taken in a recent case, *Wann v. State*,[113] currently before the Mississippi Supreme Court challenging the constitutionality of section 13-5-1. The defendant in this case offered testimony[114] by Dr. Gordon Henderson, professor of political science and director of the computer center at Tougaloo College, Tougaloo, Mississippi,[115] that 18- to 21-year-olds have attitudes and values

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[111] *See, e.g.*, United States v. Olson, 473 F.2d 686, 688 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973)(18- to 21-year-olds); United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973) (21- to 24-year-olds); United States v. Allen, 445 F.2d 849 (5th Cir. 1971)(per curiam)(18- to 21-year-olds); United States v. Kuhn, 441 F.2d 179, 181 (5th Cir. 1971)(21- to 23-year-olds); United States v. DiTommaso, 405 F.2d 385, 391 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969)(21- to 29-year-olds); United States v. Briggs, 366 F. Supp. 1356, 1362 (N.D. Fla. 1973)(21- to 29-year-olds); United States v. Deardorff, 343 F. Supp. 1033, 1043-44 (S.D.N.Y. 1971)(18- to 21-year-olds, 21- through 25-year-olds); United States v. Waddy, 340 F. Supp. 309, 512-13 (S.D.N.Y. 1971)(18- to 21-year-olds); United States v. Gargan, 314 F. Supp. 414, 416-17 (W.D. Wis. 1970), *aff'd sub nom.*, United States v. Gast, 457 F.2d 141 (7th Cir.), *cert. denied*, 406 U.S. 969 (1972)(21- to 26-year-olds); People v. Hoiland, 22 Cal. App. 3d 530, 540, 99 Cal. Rptr. 523, 529 (2d Dist. Ct. App. 1971)(21- to 30-year-olds); Shadden v. State, 488 S.W.2d 54, 59 (Tenn. Crim. App.), *cert. denied*, 411 U.S. 909 (1972)(18- to 21-year-olds). *Contra*, People v. Redwine, 50 Mich. App. 593, 213 N.W.2d 841, 843 (1973)(age group cannot be cognizable); Williamson v. State, 296 So. 2d 241, 242 (Ala. Crim. App. 1972)(same)(dictum).

[112] 19 WAYNE L. REV. 1287, 1297 (1973); *see* Chevigny, *supra* note 96, at 176. *See generally* Comment, *supra* note 20, at 414, 417-18; 29 WASH. & LEE L. REV. 131, 135-36 (1972). *But see* United States v. Ross, 468 F.2d 1213, 1217 (9th Cir. 1972), *cert. denied*, 410 U.S. 989 (1973) (21- to 24-year-olds; court not persuaded by expert testimony); United States v. Briggs, 366 F. Supp. 1356, 1362 (N.D. Fla. 1973)(21- to 29-year-olds; same); United States v. Gargan, 314 F. Supp. 414, 416-17 (W.D. Wis. 1970), *aff'd sub nom.*, United States v. Gast, 457 F.2d 141 (7th Cir. 1972)(21- to 26-year-olds; same).

[113] Wann v. State, No. 48, 702 (Miss. filed May 30, 1975).

[114] Almost identical testimony was used in a motion to quash the indictment in State v. Tedder, No. N-1487 (Hinds County Cir. Ct. July 22, 1975)(defendant acquitted by jury).

[115] Dr. Henderson holds a doctor of philosophy degree from Columbia University in public law and government. He has taught at several colleges and universities, has served on the staff of the Governor of Arizona, has been a partner in a survey research firm, has conducted a study under a foundation grant of political attitudes in Hinds County, Mississippi, has conducted a survey on political attitudes under a research grant from Texas Tech University, has written several articles, and presently is preparing a book on political parties and political behavior for publication by Harper & Rowe. Record, Transcript of Motion to Quash Indictment and Petit Venire at 33-35, Wann v. State, No. 48,702 (Miss. filed May 30, 1975) [hereinafter *Wann* Record]; Transcript of Motion to Quash Indict-

which set them apart as a group more distinct than any other age group in the adult population.[116] Based on data collected by the Survey Research Center of the University of Michigan,[117] Dr. Henderson testified that the distinctive attitudes shared by 18-, 19-, and 20-year-olds are those previously discussed in this article, including distrust of law enforcement officers,[118] belief that marijuana should be legalized,[119] distrust of institutions,[120] attitudes toward minorities[121] and women,[122] and an independent political nature.[123] In addition, Dr. Henderson testified that the 18 to 21 age group has highly distinctive attitudes on amnesty for young men who refused to serve in the armed forces during the Viet Nam War.[124] He concluded that 18-, 19-, and 20-years-olds are a "readily and easily identifiable,"[125] "cognizable and discernable class"[126] whose exclusion from juries removes a unique human perspective,[127] rendering juries unrepresentative of a cross section of community voters.[128] Although it would appear the defendant, through Dr. Henderson's testimony, presented a prima facie case, the trial court did not agree,[129] and the appeal squarely confronted the Mississippi Supreme Court with the issue of legal cognizability of 18- to 21-year-olds.

The Mississippi Supreme Court has addressed the issue of exclusion of 18- to 21-year-olds in one case, *Johnson v. State*,[130] but *Johnson* was argued on a different legal theory than that presented in *Wann*. In *Johnson*, the defendant maintained that passage of the twenty-sixth

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ment at 2-4, State v. Tedder, No. N-1487 (Hinds County Cir. Ct. July 22, 1975) [hereinafter *Tedder* Transcript].

[116] *Tedder* Transcript, *supra* note 115, at 5-6; *Wann* Record, *supra* note 115, at 38.

[117] *Tedder* Transcript, *supra* note 115, at 7. The University of Michigan studies have been conducted every 2 years since 1948. *Id.*

[118] *Wann* Record, *supra* note 115, at 41-42 (offer of proof); *see Tedder* Transcript, *supra* note 115, at 9-10 (offer of proof); notes 95 & 96 and accompanying text *supra.*

[119] *Tedder* Transcript, *supra* note 115, at 6; *Wann* Record, *supra* note 115, at 39. See note 102 and accompanying text *supra.*

[120] *Wann* Record, *supra* note 115, at 41; see notes 77 through 79 & 91 through 92 and accompanying text *supra.*

[121] *Tedder* Transcript, *supra* note 115, at 6-7; see note 80 and accompanying text *supra.*

[122] *Tedder* Transcript, *supra* note 115, at 6-7; see note 88 and accompanying text *supra.*

[123] *Tedder* Transcript, *supra* note 115, at 6; *Wann* Record, *supra* note 115, at 39; *see* note 77 and accompanying text *supra.*

[124] *Tedder* Transcript, *supra* note 115, at 6; *Wann* Record, *supra* note 115, at 39.

[125] *Tedder* Transcript, *supra* note 115, at 8.

[126] *Id.* at 12; *see Wann* Record, *supra* note 115, at 36.

[127] *Tedder* Transcript, *supra* note 115, at 10, 16-17.

[128] *Wann* Record, *supra* note 115, at 43 (offer of proof).

[129] *Tedder* Transcript, *supra* note 115, at 19; *Wann* Record, *supra* note 115, at 53.

[130] 260 So. 2d 436 (Miss. 1972).

amendment lowering the voting age in Mississippi to 18 years "pre-empted"[131] Mississippi's statutorily prescribed age requirement of 21 years for jury service. The Mississippi court rejected the argument:

> It is alleged that there were no jurors within the age group of appellant (18-20) on either the grand jury or the petit jury. It is argued that *because* this age group has been permitted by amendment to the United States Constitution to register and vote, they should be on the jury lists. Our Legislature has prescribed qualifications for jurors in Section 1762 Mississippi Code of 1942 Annotated (Supp. 1971); and as a part thereof is the requirement that jurors be twenty-one years of age or older. The fact that the Constitution of the United States was amended by Amendment XXVI does not qualify persons under twenty-one years of age as jurors under State laws.[132]

All other courts which have met the argument that passage of the twenty-sixth amendment ipso facto lowered the age of jury service to 18 years likewise have rejected it.[133] However, in *none* of these cases, nor in *Johnson*, was the defendant's sixth amendment fundamental right to a jury drawn from a fair cross section of the community urged upon or considered by the courts.

The cases also have been unanimous in their rejection of challenges to statutory exclusions of 18- to 21-year-olds on equal protection[134] and due process grounds.[135] Challenges on equal protection grounds have contended that statutory exclusion of 18- to 21-year-olds arbitrarily discriminates against persons in the age group as a class.[136] The courts,

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[131] Brief for Appellant at 13, Johnson v. State, *id.*

[132] 260 So. 2d at 437 (emphasis added).

[133] *E.g.*, United States v. Olson, 473 F.2d 686 (8th Cir.), *cert. denied*, 412 U.S. 905 (1973); State v. Silva, 259 So. 2d 153, 161 (Fla. 1972); People v. Scott, 17 Ill. App. 3d 1026, 309 N.E.2d 257, 260-61 (1974); Shelby v. State, 479 S.W.2d 630, 637 (Mo. 1974); Vasquez v. State, 500 S.W.2d 518, 520 (Tex. Crim. App. 1973).

[134] Such challenges by defendants in federal cases are based upon the due process clause of the fifth amendment which has been construed to prohibit discrimination against arbitrarily defined classes. *E.g.*, Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Such challenges by defendants in state cases are based, of course, on the equal protection clause of the fourteenth amendment.

[135] See notes 25 through 33 and accompanying text *supra*.

[136] *E.g.*, United States v. Duncan, 456 F.2d 1401, 1404-05 (9th Cir.), *vacated and remanded*, 409 U.S. 814, *rev'd on other grounds per curiam*, 470 F.2d 961 (9th Cir. 1972); People v. Scott, 17 Ill. App. 3d 1026, 309 N.E.2d 257, 258-60 (1974); Commonwealth v. Lussier, 305 N.E.2d 499, 505 (Mass. 1973)(18- to 22-year-olds); State v. Stewart, 120 N.J. Super. 509, 295 A.2d 202 (App. Div. 1972)(per curiam); *see* United States v. Arnett, 342 F. Supp. 1255, 1257, 1260-61 (D. Mass. 1970); People v. Chesnut, 26 N.Y.2d 481, 260 N.E.2d 501, 506-07, 311 N.Y.S.2d 853 (1970); State v. Boggs, 80 Wash.2d 427, 495 P.2d 321, 325-26 (1972).

though, applying traditional "rational relation" equal protection standards,[137] have held such classifications are not unreasonable.[138] Due process challenges similarly have urged that the legislative exclusions are unreasonable and unfair and result in biased juries.[139] The courts have answered that legislatures validly may set age qualifications for jury service without offending traditional due process fundamental fairness notions.[140] As in the ipso facto theory cases, the defendant's sixth amendment fundamental right was not at issue in these cases.

Another wholly unsuccessful challenge raised by defendants aged 18, 19, and 20 is that statutory exclusion of 18-, 19-, and 20-year-olds deprives defendants of that age group of their right to have their "peers" included in the jury selection scheme.[141] The historical origins of this claimed "right" are in the Magna Carta,[142] but defendants have not agreed upon the source of the "right" in the law of this country. Some defendants have contended it is derived from the sixth amendment,[143] others have suggested a fifth amendment source,[144] and still others apparently have rested their contention on an equal protection theory.[145]

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[137] A rational relation between the classification and a legitimate legislative goal satisfies this test. *E.g.*, Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 56 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

[138] See cases cited note 136 *supra*.

[139] *See, e.g.*, United States v. Hamling, 481 F.2d 307, 314 (9th Cir. 1973), *aff'd*, 418 U.S. 87 (1974); United States v. Gargan, 314 F. Supp. 414, 416-18 (W.D. Wis. 1970), *aff'd sub. nom.*, United States v. Gast, 457 F.2d 141 (7th Cir. 1972). See also notes 25 through 33 and accompanying text *supra*.

[140] *See, e.g.*, People v. Scott, 17 Ill. App. 3d 1026, 309 N.E.2d 257, 258-60 (1974); State *ex rel.* McNary v. Stussie, 518 S.W.2d 630, 637 (Mo. 1974).

[141] *E.g.*, United States v. Allen, 445 F.2d 849 (5th Cir. 1971) (per curiam); United States v. McVean, 436 F.2d 1120, 1122 (5th Cir.), *cert. denied*, 404 U.S. 822 (1971); Hopkins v. State, 19 Md. App. 414, 311 A.2d 483, 485-86 (1973); State v. Stewart, 120 N.J. Super. 509, 295 A.2d 202 (App. Div. 1972)(per curiam); Commonwealth v. Fisher, 447 Pa. 405, 290 A.2d 262, 266 (1972); *see* People v. Hines, 79 Misc. 2d 330, 360 N.Y.S.2d 180, 183 (City Ct. 1974).

[142] Labat v. Bennett, 365 F.2d 698, 711 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967); 29 WASH. & LEE L. REV. 131, 135 (1972).

> Judicial concern with proper selection dates back to the English common law principle that a trial by jury presupposed a defendant being tried by his peers of the vicinage. But regardless of the limitations that were inherent in the common law concept of trial by one's peers, a properly constituted jury in the United States is one selected from a cross section of the community.

19 WAYNE L. REV. 1287, 1288 (1973)(footnotes omitted).

[143] United States v. Allen, 445 F.2d 849 (5th Cir. 1971)(per curiam); Commonwealth v. Fisher, 447 Pa. 405, 290 A.2d 262, 266 (1972).

[144] United States v. Allen, 445 F.2d 849 (5th Cir. 1971)(per curiam).

[145] United States v. McVean, 436 F.2d 1120, 1122 (5th Cir.), *cert. denied*, 404 U.S. 822 (1971); Hopkins v. State, 19 Md. App. 414, 311 A.2d 483, 485-86 (1973); State v. Stewart, 120 N.J. Super. 509, 295 A.2d 202, 203 (App. Div. 1972)(per curiam).

Whatever the basis of the challenge, it has been uniformly rejected.[146] Again, courts addressing these challenges either have not considered age group cognizability with reference to the defendant's sixth amendment fundamental right to a jury selected from a fair cross section of the community,[147] or have found proof of cognizability lacking.[148]

All of these prior challenges to exclusion of 18-, 19-, and 20-year-olds from the jury selection process are distinguishable from that presented in *Wann*. In *Wann*, the argument was that since the sixth amendment right to a jury drawn from a fair cross section of the community is a fundamental right,[149] presentation of a prima facie case of

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> The thrust of this argument seems to be that accused persons within that age group [18 to 21], such as McVean, are deprived of the constitutional right of adults to a jury of their peers without being given the compensating special protections afforded juveniles. Significantly, McVean can cite no cases to support his argument.

United States v. McVean, *supra* at 1122.

[146] *See* cases cited note 141 *supra*.

[147] *E.g.*, cases cited note 145 *supra*.

[148] *See, e.g.*, United States v. Allen, 445 F.2d 849 (5th Cir. 1971)(per curiam); Hopkins v. State, 19 Md. App. 414, 311 A.2d 483, 487 (1973).

[149] *See* Taylor v. Louisiana, 419 U.S. 522, 526-30 (1975); Duncan v. Louisiana, 391 U.S. 145, 149 (1968); Irvin v. Dowd, 366 U.S. 717, 722 (1961); Comment, *supra* note 20, at 418.

In one case the defendant urged that exclusion of 18- to 21-year-olds from the jury selection process violated his sixth amendment fundamental right, but in that case the court did not reach the issue. United States v. Waddy, 340 F. Supp. 509, 512 (S.D.N.Y. 1971).

While it is of course true that jurors must meet valid qualifications, United States v. McVean, 436 F.2d 1120, 1122 (5th Cir.), *cert. denied*, 404 U.S. 822 (1971); United States v. Valentine, 288 F. Supp. 957, 965 (D.P.R. 1968), and it could hardly be maintained that persons under the age of 18 should be entitled to serve on juries, once voter rolls are dedicated as the primary source of jurors, qualification as a voter becomes the primary qualification as a juror. *See* MISS. CODE ANN. §§ 13-5-1 (1972), 13-5-8 (Supp. 1975).

Since state qualifications for jury service must be consistent with the sixth amendment cross section standard, *see, e.g.*, Rabinowitz v. United States, 366 F.2d 34, 54-56 (5th Cir. 1966), it would appear that a secondary age qualification which eliminates a cognizable group of otherwise qualified persons from the primary juror source list violates a defendant's sixth amendment fundamental right, especially in light of the fact that "voting lists, themselves contain an important built-in screening element in that they eliminate those individuals who are either unqualified to vote or are insufficiently interested in the world about them to do so." United States v. Briggs, 366 F. Supp. 1356, 1359 (N.D. Fla. 1973); *accord*, Raiford v. Dillon, 297 F. Supp. 1307, 1311 (S.D. Miss. 1969).

Sixth amendment claims based on exclusion of 18- to 21-year-olds have received only cursory treatment so far, perhaps because the courts have not been presented the fundamental right argument. Moreover, it must be remembered that the sixth amendment fair cross section requirement is not static. "Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or a different place." Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

exclusion from the juror selection system of the legally cognizable group of 18- to 21-year-olds shifts the burden to the state[150] to demonstrate a compelling state interest in exclusion of the group from jury service.[151] As competence of a juror is an individual and not a group or class matter,[152] and since voter rolls, the primary source of juror selection,[153] already include the names of 18-, 19-, and 20-year-olds, eliminating any administrative convenience argument by the state[154] it appears safe to assume that no state interest superior to a defendant's sixth amendment right can be shown.

B. Underrepresentation of the 18- to 30-Year Old Class

If the Mississippi court is not willing to hold the 18- to 21-year-old group cognizable, the above analysis obviously fails, but an alternative argument not presented in *Wann* possibly may be successful in future cases. The premise of the alternative challenge to section 13-5-1 is that a larger age group consisting of 18- to 30-year-olds is legally cognizable. The contention is that the statute, by deliberately excluding 18- to 21-year-olds from the jury selection scheme, causes the larger, legally cognizable 18- to 30-year-old group to be so substantially underrepresented that a defendant's sixth amendment fundamental right to a jury drawn from a fair cross section of the community is violated.

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[150] *E.g.*, Turner v. Fouche, 396 U.S. 346, 355 n.13 (1970); Whitus v. Georgia, 385 U.S. 545, 550 (1967); Labat v. Bennett, 356 F.2d 698, 719 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1961). See note 38 and accompanying text *supra*.

[151] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155-56 (1973); Shapiro v. Thompson, 394 U.S. 618, 638 n.21 (1969); Harper v. Virginia Bd. of Electors, 383 U.S. 663, 670 (1966).

[152] Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.

Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946); *see* United States v. Duke, 263 F. Supp. 828, 836 (S.D. Ind. 1967).

[153] Every April a master juror list composed of registered voters in each county is prepared by the county jury commissioners. Miss. Code Ann. § 13-5-8 (Supp. 1975).

Although beyond the subject of this article, it is worth noting that it has been argued that use of voter lists as the source of jurors is inherently discriminatory against the young, poor, and minorities. *E.g.*, Kairys, *supra* note 26, at 771; Comment, *supra* note 20, at 415-16; Note, *supra* note 20, at 1421-25. The courts, however, have consistently approved use of voter rolls as juror source lists. *E.g.*, United States v. Dellinger, 472 F.2d 340, 365 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); United States v. Guzman, 468 F.2d 1245, 1248 (2d Cir.), *cert. denied*, 410 U.S. 937 (1972); United States v. Dangler, 422 F.2d 344 (5th Cir. 1970); United States v. Butera, 420 F.2d 564, 573 (1st Cir. 1970); Raiford v. Dillon, 297 F. Supp. 1307, 1310-11 (S.D. Miss. 1969); Shelby v. State, 479 S.W.2d 31, 40 (Tex. Crim. App. 1972).

[154] *Cf.* federal master wheel refilling cases cited at note 105 *supra*.

Social scientists generally agree that age 30 is the cutoff for the "youth" group characterized by the distinct values and attitudes discussed earlier.[155] Judicial precedent, too, has recognized that age 30 is the line of demarcation for the purpose of cognizability of a youth class.[156]

To compute underrepresentation of a cognizable group, the most realistic figures are determined from a comparison of the number of members of the cognizable group apparently qualified for jury service with the number of group members actually considered for service in the juror selection scheme.[157] The deviation from the fair cross section standard should be computed by absolute measure, that is, by subtracting the percentage of members of the cognizable group actually considered in the juror selection process from the total percentage of group members apparently qualified for jury service.[158] To compute the percent deviation from the cross section standard of the 18- to 30-year-old group caused by the exclusion of 18-to 21-year-olds from the selection process under section 13-15-1,[159] the total population in each county aged 18 to 30 is the apparently qualified population, since the principal qualification for jury service, other than age, is registration in the county as a voter,[160] and since all persons between 18 and 30 are potentially eligible voters.[161] The percent deviation, then, can be determined by subtracting

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[155] THE SOCIOLOGY OF YOUTH: EVOLUTION AND REVOLUTION 84 (H. Silverstein ed. 1973); Bensonan, *American Youth and the Class Structure*, in *id.* at 68; Keniston, *Youth: A "New" Stage of Life*, *supra* note 69, at 35; Rozak, *Youth and the Great Refusal*, in THE PROSPECT OF YOUTH (T. Cottle ed. 1972); Starr, *supra* note 69, at 174.

[156] This Court agrees with defense counsel that "young people" are a cognizable group. Many young people in the United States today have different values, different standards, different attitudes, different lifestyles and different feelings toward our political system and its processes than do their elders. In recognizing this group, the Court does not mean to say that in order to be a member of this class it is necessary that one exemplify all of the above traits or characteristics, or that those 30 years of age and older are automatically excluded from the group; nor does the group include all those 29 years old and younger. The group cannot be simply defined; however, such a group or class does exist and the vast majority of those within the group are 29 years and under. See United States v. Butera, *supra*.

United States v. Sinclair, No. 44375 (E.D. Mich. 1971)(unreported), *quoted in* A. GINGER, *supra* note 17, § 3.67, at 176; *see* Robson v. Grand Trunk W.R.R., 5 Mich. App. 90, 145 N.W.2d 846, 849 (1966). *But see* United States v. Quinn, 364 F. Supp. 432, 436 (N.D. Ga. 1973), *aff'd on other grounds*, 514 F.2d 1250 (5th Cir. 1975).

[157] *See* United States v. Butera, 420 F.2d 564, 570 (1st Cir. 1970); Gewin, *supra* note 67, at 833.

[158] *See* Gewin, *supra* note 67, at 834-35.

[159] See note 106 *supra*.

[160] MISS. CODE ANN. §§ 13-5-1 (1972), 13-5-8 (Supp. 1975).

[161] U.S. CONST. amend. XXVI; MISS. CONST. art. 12, § 241 (Supp. 1975).

the percentage which group members considered in the jury selection process represent (county population, 21- through 29-year-olds) from the percentage of group members (county population, 18- to 30-year-olds) apparently qualified (100 percent).

As illustrated in the following table, applying the above method of computation to United States Bureau of Census demographic figures[162] for selected Mississippi counties[163] discloses staggering underrepresentation of the 18- to 30-year-old group in the jury selection process.

County	Population 18 to 21	Population 18 to 30	Percent Underrepresentation (to nearest whole)
Claiborne	990	2117	47
Holmes	1578	3477	45
Humphreys	777	2070	39
Jefferson	547	1309	42
Noxubee	738	1919	38
Sharkey	459	1239	37
Tunica	590	1538	38
Wilkinson	550	1561	35

Although there are no clear standards as to what is "substantial underrepresentation,"[164] disparities of the sizes here surely should be included under any interpretation. It also has been pointed out that the earlier in the jury selection process underrepresentation occurs, that is, in selection of the master juror list as opposed to selection of a particular panel, the smaller the permissible deviation should be.[165] This is plainly logical; after the master list is compiled, excuses, exemptions, and peremptory challenges may significantly alter the composition of a panel.[166] A prima facie case, then, is presented by a showing of such substantial underrepresentation of the 18- to 30-year-old cognizable group, placing on the state the onus of demonstrating a compelling state interest constitutionally subjugating a defendant's sixth amendment fundamental right.[167]

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[162] The population figures are computed from BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, PART 26, CHARACTERISTICS OF THE POPULATION, MISSISSIPPI, Table 35.

[163] For convenience, the same counties used in discussing the racially discriminatory operation of MISS. CODE ANN. § 13-5-1 (1972), at text accompanying note 170 *infra*, are used here.

[164] *See* notes 171, 172 & 177 and accompanying text *infra*.

[165] Gewin, *supra* note 67, at 835.

[166] *Id.*

[167] The state should not be able to make such a showing for the same reasons stated at notes 149 through 153 and accompanying text *supra*.

In underrepresentation of youth cases, courts have sometimes bolstered their findings of no underrepresentation with presumptions about young people's transience, military

III. The Statute is Racially Discriminatory[168]

There is another reason that section 13-5-1[169] is unconstitutional: It discriminates against black people. Using the 1970 Census of Population, it can be convincingly demonstrated that in counties with the greatest percentage of black population, the statute, by excluding 18- to 21-year-olds from jury service, causes Blacks to be significantly under-represented on grand and petit jury venires. For example, in Claiborne County, where the total population is 74.9 percent black, only 67.65 percent of the Blacks presently could be qualified for jury duty. If all persons 18 years of age and older (the voting age population) were eligible for jury service, the population eligible for jury service would be 71.34 percent black. If the entire voting age population of Blacks were eligible for jury service, the percentage of black people eligible for jury service would increase by 25.13 percent. In six other counties with black population majorities, the percentage of black people eligible for jury service would increase between 11.7 and 14.2 percent. The following chart shows the racial impact of the statute.[170]

County (% Black and other minority)	Jury Age Population (21 & over)		Voting Age Population (18 & over)		Percent Increase	
	White	Black	White	Black	White	Black
Claiborne 74.9%	1699 32.03%	3589 67.65%	1786 28.37%	4491 71.34%	5.12%	25.13%
Humphreys 65.1%	3172 43.50%	4085 56.02%	3405 42.20%	4625 57.32%	7.35	13.22
Jefferson 75.3%	1544 32.35%	3228 67.63%	1633 30.70%	3685 69.27%	5.76	14.16

obligations, educational diversions, and responsibilities to young children to explain, at least in part, the claimed underrepresentation. *E.g.*, United States v. Hamling, 481 F.2d 307, 314 (9th Cir. 1973), *aff'd*, 418 U.S. 87 (1974); United States v. Duncan, 456 F.2d 1401, 1405 (9th Cir.), *vacated and remanded*, 409 U.S. 814, *rev'd on other grounds*, 470 F.2d 961 (9th Cir. 1972); United States v. DiTommaso, 405 F.2d 385, 389, 391 (4th Cir. 1968), *cert. denied*, 394 U.S. 934 (1969); United States v. Leonette, 291 F. Supp. 461, 477 (S.D.N.Y. 1968); People v. Hoiland, 22 Cal. App. 3d 530, 539-40, 99 Cal. Rptr. 523, 529 (2d Dist. Ct. App. 1971); State v. Holmstrom, 43 Wis. 465, 168 N.W.2d 574, 578 (1969). However, to base a finding of no underrepresentation on such presumptions does not comport with the requirement that conclusory assertions by the state will not rebut a prima facie case, Gewin, *supra* note 67, at 824, nor is it consistent with the principle that juror competence is an individual and not a group or class matter. See note 152 *supra*.

[168] Grateful acknowledgement for the idea for this section is due to Howard Clark Coleman, Jr., of Houston, Mississippi.

[169] See note 106 *supra*.

[170] The figures are computed from Bureau of the Census, 1970 Census of Population, Part 26, Characteristics of the Population, Mississippi, Table 35.

Noxubee	3058	4185	3264	4713	6.74	12.62
66.1%	41.79%	57.20%	40.52%	58.51%		
Sharkey	1966	2374	2091	2703	6.36	13.86
65.0%	45.12%	54.49%	43.42%	56.13%		
Tunica	2008	3710	2140	4167	6.57	12.32
72.8%	35.07%	64.80%	33.89%	65.99%		
Wilkinson	2292	3646	2415	4073	5.37	11.71
67.7%	38.53%	61.29%	37.16%	62.67%		

Although the Supreme Court "has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors,"[171] it has clearly established that total exclusion of a cognizable class is not required and that systematic substantial underrepresentation is also unconstitutional.[172] Racial discrimination in the jury selection process is clearly unconstitutional;[173] here we see that discrimination against one cognizable class (18- to 21-year-olds) results in discrimination against another cognizable class (Blacks).[174]

IV. Section 13-5-1 Violates the Mississippi Constitution

Article 3, section 26 of the Mississippi Constitution provides that in all criminal prosecutions by indictment or information:

> The accused shall have a right to. . . a speedy and public trial by an impartial jury of the county where the offense was committed . . . .

The Mississippi Supreme Court has been zealous in protecting this right;[175] it has also applied the law enunciated by the United States

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[171] Alexander v. Louisiana, 405 U.S. 625, 630 (1972).

[172] *Id.* at 629-30 (county population 21 percent black; grand jury venire 5 percent black); Turner v. Fouche, 396 U.S. 346, 359 (1970)(black population of county 60 percent; Blacks on list from which grand jury drawn 37 percent); Whitus v. Georgia, 385 U.S. 545, 550 (1967); Thiel v. Southern Pac. Co., 328 U.S. 217, 223 (1946).

The Fifth Circuit may go further:

> This Court has made it absolutely clear that a significant disparity between the demographic patterns in a county and the relative percentages of each demographic group selected for the jury lists may warrant corrective action by a federal court absent a countervailing explanation by the jury commission. The district court in an injunctive case such as this one may exact from the jury commissioners "a high standard of comparability between demographic percentages and those of the jury list."

Foster v. Sparks, 506 F.2d 805, 810 (5th Cir. 1975) (citations omitted).

[173] *See* cases cited note 20 *supra*.

[174] *See* Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967)(discrimination against daily wage earners also discriminates against Blacks).

[175] Adams v. State, 220 Miss. 812, 72 So. 2d 211 (1954); Collins v. State, 99 Miss. 47,

Supreme Court in many cases involving racial discrimination in jury selection.[176] In addition, the Mississippi Supreme Court has accepted the principle that substantial underrepresentation, and not complete exclusion, can make out a case of discriminatory jury selection.[177]

Interestingly enough, at the 1890 Mississippi Constitutional Convention, which had as its main purpose devising the "legal" means to disfranchise black people,[178] proposals were made to grant the franchise to 18-year-olds and to women.[179] It was thought that such action, when coupled with property ownership requirements, would increase the percentage of voters who were white.[180]

It is clear that the Mississippi court has the power to hold that section 13-5-1 violates article 3, section 26 of the Mississippi Constitution, regardless of whether the statute also violates the Federal Constitution.[181] When necessary many courts,[182] including the Mississippi Supreme Court, have interpreted their state constitutions to provide broader protection to the rights of the people than does the Federal Constitution as interpreted by the United States Supreme Court.[183]

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54 So. 665 (1911). *See also* City of Jackson v. Clark, 152 Miss. 731, 118 So. 350, 354 (1928) (Ethridge, J., dissenting).

[176] *E.g.*, Chinn v. State, 248 So. 2d 801 (Miss. 1971), *cert. denied*, 414 U.S. 1006 (1973); Caston v. State, 240 So. 2d 443 (Miss. 1970); Spencer v. State, 240 So. 2d 260 (Miss. 1970); Williams v. State, 210 So. 2d 780 (Miss. 1968).

[177] Caston v. State, 240 So. 2d 443 (Miss. 1970) (36.2 percent black population, 15.16 percent Blacks on jury lists); Spencer v. State, 240 So. 2d 260 (Miss. 1970)(36.2 percent black population, black percentage on jury lists 2.97 percent for men and 4.31 percent for women).

[178] Ratliffe v. Beale, 74 Miss. 247, 20 So. 865 (1896); E. Clark, The Mississippi Constitutional Convention of 1890: A Political Analysis, May 1975 (unpublished thesis in University of Mississippi Library).

[179] E. Clark, *supra* note 178, at 51, 104.

[180] *Id.*

[181] See Ker v. California, 374 U.S. 23, 34 (1963). *See generally* Mosk, *The Constitution of California in the Era of the Burger Court and States Rights*, Los Angeles Daily Journal, Dec. 1973, Report Section at 26-29 (author is California Supreme Court Justice); *Project Report: Toward An Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271 (1973); Comment, *Stop and Frisk in Mississippi: Is it Legal? Should it be? A Comment on Keys v. State*, 45 MISS. L.J. 763, 780-81 (1974).

[182] Gilbreath v. Wallace, 292 Ala. 267, 292 So. 2d 651 (1974) (state constitution guarantees 12-member jury in will contest); Ravin v. State, 537 P.2d 494 (Alas. 1975)(right to privacy protects smoking marijuana in own home); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975)(state constitution limits broad authority to search incident to custodial arrests announced in Gustafson v. Florida, 414 U.S. 260 (1973) and United States v. Robinson, 414 U.S. 218 (1973)).

[183] *Compare* Davidson v. State, 240 So. 2d 463 (Miss. 1970)(does not recognize "open fields" doctrine), *with* Hester v. United States, 265 U.S. 57 (1924). *Compare* Smith v. State, 240 Miss. 738, 128 So. 2d 857 (1961) (arrest begins when pursuit begins), *with* Henry v. United States, 361 U.S. 98 (1959). *Compare* Falkner v. State, 135 Miss. 253, 98 So. 691

Since the systematic exclusion of 18- to 21-year-olds from jury service deprives those young people from participation in one of the most sacred rights, duties, and obligations of citizenship, the Mississippi Supreme Court should not hesitate to hold that the challenged section is unconstitutional under state law.

Conclusion

> The one institution in the judicial process that seems to be preeminently designed for and capable of an expression of contemporary politics, humanity, and reason is the jury. The jury is, in theory, the voice of the people. However, black, poor, and young people, and anyone who would fundamentally change the society, find virtually no "peers" on American juries. Juror selection systems, cloaked with the aura of democracy in action, in fact serve to exclude systematically almost anyone who shares their experiences and values. American juries are, by and large, representative of the white, middle-aged, suburban/rural middle class, not the whole people.[184]

If the jury is to fulfill the democratic ideal of a truly representative reflection of the community's sense of justice, arbitrary barriers in the juror selection process which defeat attainment of the ideal must not be allowed to stand. We have seen that section 13-5-1 of the Mississippi Code[185] defeats the ideal by excluding certain young adults and by causing underrepresentation of Blacks. While it may be true that in the past a fair cross section of the community need not have included young adults aged 18 to 21, this is not the case today. "Communities differ at different times and places. What is a fair cross section at one time or place is not necessarily a fair cross section at another time or another place."[186]

As mentioned at the outset of this article, inclusion of 18- to 21-year-olds in the jury selection process will produce benefits to the public in addition to protecting defendants' rights to fair and unbiased juries.[187] Inclusion would operate to integrate these young adults into "the system" by entrusting them with the social responsibility of jury service, allowing them the opportunity to ensure that our criminal justice sys-

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(1924), *and* Tucker v. State, 128 Miss. 211, 90 So. 845 (1922), *with* Mapp v. Ohio, 367 U.S. 643 (1961)(Mississippi state courts adopted "exclusionary rule" 39 years before *Mapp* commanded it). *See also* Keys v. State, 283 So. 2d 919 (Miss. 1973)(stop and frisk illegal in Mississippi). *But see* Singletary v. State, 318 So. 2d 873 (Miss. 1975)(stop and detention for investigatory purposes legal).

[184] Kairys, *supra* note 26, at 771.

[185] See note 106 *supra*.

[186] Taylor v. Louisiana, 419 U.S. 522, 537 (1975).

[187] *See* Comment, *supra* note 20, at 419.

tem in reality provides defendants fair trials. Also, including these young people in the jury selection system will help prevent young defendants[188] from feeling they have been victimized by a criminal justice system which excludes from juries persons who might be more sympathetic to their plight.

There is no excuse for perpetuating flaws in the jury selection process which prevent nearer attainment of the ideal of the jury as a reflection of the community's sense of justice. Modification of Mississippi's jury selection system to include 18- to 21-year-olds would not, as pointed out previously,[189] cause any administrative hardship to jury selection officials since section 13-5-8 requires that master juror lists be recompiled annually.[190] For the benefit of all—defendants, young adults, the public at large—Mississippi's exclusion of 18- to 21-year-olds from the jury selection system should be ended.

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[188] Of all arrests for all crimes, persons under age 30 represent 63.6 percent of the total. *See* NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, *supra* note 99, Table 4.4, at 269.

[189] See notes 105, 153 & 167 and accompanying text *supra*.

[190] MISS. CODE ANN. § 13-5-8 (Supp. 1975). Even if this were not the case, "[t]he right to a proper jury cannot be overcome on merely rational grounds." Taylor v. Louisiana, 419 U.S. 522, 534 (1975)(footnote omitted).

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR and
the UNIVERSITY of MISSISSIPPI SCHOOL of LAW

VOLUME 47 JANUARY 1976 NUMBER 1

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COMMENTS

PROCEDURAL REFORM IN MISSISSIPPI: A CURRENT ANALYSIS

Mississippi civil procedure was recently described as "[a]ntiquated and ill-designed for use in modern trial practice . . . [a] hodgepodge of confusing, scattered statutes, court rules, and case decisions . . . ."[1] Unfortunately for lawyer and client alike, the accuracy of this description is barely subject to honest dispute. Also unfortunate is the fact that Mississippi civil procedure has been similarly and repeatedly denounced for many years.

Because of recent events, an analysis of Mississippi civil procedure is both timely and necessary at this point. Therefore, with civil procedure in this state now vulnerable to reform, this comment will discuss the attempts and failures at reform in the past, the recent changes in the legislative and judicial attitude toward the rulemaking power in Mississippi, the results of procedural reform in other jurisdictions, and will then propose a plan of procedural reform for this state.[2]

I. Setting the Stage for Reform

A. The Calls for Reform

The calls for the reform of Mississippi civil procedure have been persistent, resourceful, prophetic, and, for the most part, fruitless.[3] One common feature found in these calls is the recognition of the need for reform and of the consequences flowing directly from the failure to reform.[4] Early calls, often seeking adoption of the Federal Rules of Civil

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[1] Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 Miss. L.J. 287 (1972).

[2] Two recent works have dealt with related aspects of the topic to be discussed, and this comment is intended to complement these writings to provide comprehensive discussion of the subject. *See* Pyle, Ott & Rumfelt, *Mississippi Rules of Discovery*, 46 Miss. L.J. 681 (1975); 46 Miss. L.J. 849 (1975).

[3] *See, e.g.*, Bunkley, *Some Observations on Our Judicial System*, 26 Miss. L.J. 1 (1954); Ethridge, *Improving the Machinery of Justice: A Challenge to the Bar*, 37 Miss. L.J. 506 (1966); Fant, *Procedural Reform in Mississippi*, 34 Miss. L.J. 40 (1962); Franck, *supra* note 1; Patterson & Patterson, *A Plea for Procedural Reform in Mississippi*, 42 Miss. L.J. 293 (1971); *Proceedings of the Thirty-Ninth Annual Meeting of the Mississippi State Bar*, 16 Miss. L.J. 299, 335 (1944) [hereinafter cited as *Thirty-Ninth Annual Meeting*]; Triplett, *Hocus-Pocus Legal Procedure—A Need for Reform*, 16 Miss. L.J. 9 (1943).

[4] *See Thirty-Ninth Annual Meeting, supra* note 3, at 335-36:

> 1, [T]here is a growing tendency in some departments and bureaus of the state and federal governments, and of the general public to circumvent the Courts;

Procedure,[5] sought legislative enactment of a modernized system of procedure.[6] Later efforts for reform advocated vesting rulemaking power in the state supreme court, either by statute or by constitutional amendment.[7] One suggested basis for reform, and the one subsequently adopted by the supreme court, was a declaration that the rulemaking power of the judicial branch is an inherent power derived from the state constitution.[8] Dean Pound in 1926 discussed the historical factors in England and America causing reliance on legislatures for rules of procedure[9] and concluded that this reliance was misplaced and detrimental to the efficient administration of substantive law:

> [W]e cannot go on in the urban, industrial America of today under the heavy weight of procedural detail with which our courts are struggling. If we demand that our courts do things, we must give them power to do things . . . . We must hold them to the substantive law, indeed. But we must not make the substantive law nugatory by loading the courts with procedural requirements. We must cease to prescribe the details of procedure by legislation.[10]

The problems caused by legislative rulemaking in 1926 are greatly accentuated in today's arena of bulging dockets; yet nearly 50 years after

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> and, 2, the profession and the Courts probably have contributed to breach confidence, [sic] by long delays in trial of causes, possible under our system of pleading, practice and procedure.

See also Proceedings of the Forty-Second Annual Meeting of the Mississippi State Bar, 18 MISS. L.J. 491, 512 (1947) [hereinafter cited as *Forty-Second Annual Meeting*]: "[T]he obsolescent and cumbersome procedure under which our courts try civil cases, with the resulting delays, annoyances and injustices worked upon litigants, constitute an evil which is recognized by all."

[5] Fant, *supra* note 3, at 47-49; Patterson & Patterson, *supra* note 3, at 297; Triplett, *supra* note 3, at 10-19.

[6] *See Thirty-Ninth Annual Meeting, supra* note 3, at 336 (report of the Special Study Committee on the Proposed Civil Procedure Act of 1944):

> Two courses [for reform] by *legislation* naturally were open: either an Act to give the Supreme Court rule-making authority might be proposed, or a concise system of pleading, practice and procedure might be set up by bill. The majority favored the latter course. *Members of the Court suggested that it is more democratic.* (Emphasis added.)

[7] *See* Bunkley, *supra* note 3, at 2-3; Ethridge, *supra* note 3, at 509 (constitutional amendments); *Forty-Second Annual Meeting, supra* note 4, at 513-14 (statute). Agreement was not always unanimous, however. Speaking in opposition to the proposed bill, one member at the 42nd bar convention stated his views: "Part of this bill in my opinion is in violation of the Constitution. We are delegating to the Supreme Court of the State of Mississippi legislative power." *Id.* at 519.

[8] Franck, *supra* note 1, at 287-89; *see* Newell v. State, 308 So. 2d 71, 76 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975).

[9] Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926).

[10] *Id.* at 603.

Dean Pound's statement, Mississippi courts are still struggling under this "heavy weight of procedural detail."

The efforts of the state bar to relieve this burden have transformed in temperament from politely suggestive[11] to insistently declarative.[12] Practical considerations favoring judicial rulemaking have been voiced repeatedly. As Justice William N. Ethridge noted:

> Legislatures lack the expertise born of daily contact with procedural problems, and legislative codes have all the rigidity of ordinary statutes.
>
> . . . .
>
> [The courts] are best able to shape procedure to meet the needs of modern litigation. They . . . are able realistically to determine whether particular rules promote rather than inhibit decisions on the merits.[13]

An additional point made by Justice Ethridge, and one which should be kept in mind when contemplating the legislative response to *Newell v. State*,[14] discussed below,[15] was that "[l]egislative sessions are held at relatively long intervals. Procedural reform is relegated to low priority."[16]

The dismal outlook for procedural reform was brightened recently as the Mississippi Supreme Court refused to permit an antiquated procedural statute to undermine the efficacy of Mississippi trial courts.

B. Newell v. State

> [T]he court inherently possesses the power to establish rules of pleading, practice, and procedure . . . . The power has been dormant for quite a long time; so it might be argued that the court has abdicated its rulemaking prerogative in favor of legislative pre-emption of that

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[11] *Forty-Second Annual Meeting, supra* note 4, at 514 (Mr. Robert Burns, Committee on Procedural Reform Studies):

> The Legislature is essentially a body of laymen, and *to continue to ask* the Legislature to control and regulate the trial of civil cases . . . is something akin to the notion that a layman is competent to advise a physician or surgeon as to how to perform an operation. (Emphasis added.)

[12] *See* Franck, *supra* note 1, at 309:

> There is really no reason why the court should await the pleasure of the legislative branch to secure the many reforms that are required to equip the courts to handle their business in a businesslike manner.

[13] Ethridge, *supra* note 3, at 509.

[14] 308 So. 2d 71 (Miss. 1975), *noted in* 46 Miss. L.J. 849 (1975).

[15] *See* text accompanying notes 17 through 24 *infra*.

[16] Ethridge, *supra* note 3, at 509.

> field. Historically and analytically, however, the power is the court's. It can and should retrieve that power.[17]

An attempt to retrieve that rulemaking power, the success of which must be evaluated at some later date, came in Justice Neville Patterson's majority opinion in *Newell v. State.*[18] Striking down a legislative prohibition against trial judges instructing the jury,[19] which had been on the books since 1857, Justice Patterson vividly depicted the deleterious results of permitting the statute to remain in effect these long years:

> The record portrays a discrepancy in our state's legal procedure that has literally cost thousands of dollars in new trials, untold expenditure of time, docket congestion and prolonged litigation . . . . [T]his prohibition has been in the past, and now is, an impediment to the administration of justice that can no longer be indulged in courts of constitutional origin . . . .[20]

The opinion, in which all the justices concurred, declared the court's rulemaking power an inherent one "emanat[ing] from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts,"[21] and relegated procedural statutes to "legislative suggestions."[22]

Possibly the most cogent passage in *Newell*, however, is the unqualified declaration that the Mississippi Constitution[23] "leaves no room for

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[17] Franck, *supra* note 1, at 288-89 (footnote omitted).

[18] 308 So. 2d 71 (Miss. 1975), *noted in* 46 MISS. L.J. 849 (1975).

[19] MISS. CODE ANN. §§ 11-7-155 (civil), 99-17-35 (criminal) (1972). This prohibition first appeared in Miss. Code ch. 61, § 12, art. 161 (1857).

[20] 308 So. 2d at 74.

[21] *Id.* at 76.

[22] *Id.* Rather than declare all existing civil procedure statutes invalid because emanating from the legislative rather than judicial branch, the court in *Newell* held:

> [A]s long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest, but when, as here, the decades have evidenced a constitutional impingement, impairing justice, it remains our duty to correct it.

Id. at 78.

Reminiscent of Justice Ethridge's conviction that judges and not legislators should promulgate procedural rules was Justice Patterson's declaration that

> [t]he procedural changes needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose would be better served, we believe, if promulgated by those conversant with the law through years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and professions.

Id. at 76.

[23] MISS. CONST. art. 6, § 144: "The judicial power of the state shall be vested in a

a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[24] The determination with which the court adheres to this position hopefully will never be seriously challenged—but the potential for such a challenge came with the legislature's response to *Newell*.

C. *The Legislative Response to* Newell

On April 7, 1975, the Mississippi Legislature substantially adopted the federal rules of discovery for Mississippi.[25] The rules were heartily welcomed by the many practitioners grown weary of the secretive approach to trying cases. In the same breath, however, the legislature granted the state supreme court "the power to prescribe from time to time by general rules . . . the practice and procedure of the circuit, chancery and county courts of this state in civil actions."[26]

In two subsequent sections, the Act sets out a procedure by which rules promulgated by the court are to be submitted to the legislature for approval prior to becoming effective.[27] Considering the unequivocal dec-

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Supreme Court and such other courts as are provided for in this constitution."

Section 2 of article 1 of the constitution specifically mandates: "No person or collection of persons, being one or belonging to either of these departments [legislative, judicial, and executive], shall exercise any power properly belonging to either of the others . . . ."

[24] 308 So. 2d at 77.

[25] MISS. CODE ANN. §§ 13-1-201, -226 to -237, -241, -243 (Supp. 1975).

[26] *Id.* § 9-3-61.

[27] *Id.* §§ 9-3-71 to -73. These provisions require affirmative action *disapproving* the submitted rule, or part thereof, rather than *approval* of the rule. While this may connote a subtle presumption favoring legislative approval, it has the effect of requiring passage of the entire 60-day period in which the en banc committees of both houses must act to disapprove a rule.

Section 9-3-71 processing requires:

(1) Submission of proposed rules at least 120 days prior to beginning of a regular session of the legislature;

(2) passage within 60 days, during which the en banc judiciary committee of either house may *disapprove* such proposed bill;

(3) distribution of rules not disapproved to members of the legislature and bar at least 30 days before the beginning of the *next* succeeding regular session;

(4) rules become effective the July 1 next succeeding *unless* disapproved by a concurrent resolution of the en banc judiciary committees of both houses which is pased before *sine die* adjournment.

Considering that the Mississippi Legislature meets only one 90-day regular session each year (120 days in years following elections), a rule submitted by the Mississippi Supreme Court the first day of September would, if not disapproved at either legislative session, become effective July 1, 22 months later.

Assuming prompt attention by the en banc committees, requiring *approval* by affirm-

laration in *Newell* that the court's rulemaking power is inherent, and thus needs no grant from the legislature, sections 9-3-61 through 9-3-73 seem nothing less than an attempt to establish a "division of authority" in the rulemaking process—a division for which, in the opinion of the court, the constitution "leaves no room."[28]

The rules of discovery were seen by many as a significant and necessary step forward for Mississippi practice. The Act not only created an advisory committee[29] but included several references to funding the work of the committee, implying a legislative duty to appropriate funds for this activity.[30] Nevertheless, should the court in a proper case conclude that the delay in implementation of their rules, inevitable under section 9-3-71, constitutes an "impingement, impairing justice," it not only may, but must, according to *Newell*, refuse to acquiesce.[31] As regards the change in procedure effected in *Newell*—providing for the judge to instruct the jury, the court recognized the difficulty of implementation; accordingly, the rule applied prospectively, to "become effective not later than sixty (60) days from publication of this opinion."[32] It would seem, however, that changes in rules of less import could be implemented almost immediately without adversely affecting either party's cause. Whether the court will accept a lengthy delay by subjecting its rules to section 9-3-71 processing, and possible rejection, will in the end depend on the degree to which it remains willing to extend its "cooperative spirit."[33]

D. The Advisory Committee

Section 9-3-65 created an advisory committee on the rules of civil procedure to be composed of a justice of the supreme court, three circuit

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ative action could cut short this period.

Section 9-3-73 merely requires the court to designate those procedural statutes which conflict with the proposed rule.

[28] *See* note 24 and accompanying text *supra*.

[29] *See* notes 34 through 40 and accompanying text *infra*.

[30] Section 9-3-67 provides for employment of and compensation for a research counsel and other persons the court finds "necessary or advisable to discharge the duties" of the committee, and, while the committee members are to serve without salaries, "[r]easonable actual expenses of food, lodging and transportation incurred . . . in the performance of their duties" are payable by the court.

Presently, the legislature has in fact made no appropriation for the advisory committee. Other sources of funding have been considered, and the committee is planning an organizational meeting before the end of the year. Interview with Arlen B. Coyle, Assistant Director of the Mississippi Judicial College, in University, Mississippi, August 28, 1975.

[31] 308 So. 2d at 78.

[32] *Id.*

[33] *Id.*

court judges, three chancery court judges, two county court judges, and five practicing attorneys.[34] While creation of an advisory committee to assist the court in promulgating procedural rules is not a new idea,[35] the composition of the committee, being without legislative or lay representation, was somewhat unexpected.[36] However, a committee so composed should be more responsive to the constantly changing pressures on the procedural system it was created to monitor. Legislative or lay membership could unduly slow the committee's progress or be token membership only, considering the degree of familiarity necessary to discuss judicial procedure knowledgeably.

The advisory committee is charged with making "a comprehensive and continuing study of the [forms of process, writs, pleadings, motions, and rules of evidence] of civil practice . . . in the trial courts of this state . . . ."[37] The committee is also to draft proposed rules of procedure, publicize their provisions, and receive suggestions from the bench, bar, and public regarding their improvement.[38] Upon submission of proposed rules to the court, the court "may amend, revise, delete or add to the recommended rules . . . ."[39]

Sections 9-3-65 through 9-3-69 appear well suited to serve the advisory function of the committee. The various courts and the bar are well represented; research and staff assistance is authorized; and the bench, bar, and public have an avenue of input into the rule-developing process. To this extent, however, the judiciary could operate without legislative grants *or* controls by virtue of its inherent power as declared in *Newell*; indeed, it has the *duty* to correct procedural rules which impair justice.[40] To what extent the court will proceed under the regulatory scheme of section 9-3-71, without additional legislative funding, is difficult to predict. The answer may depend on the court's insistence that

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[34] The method of selecting the committee members, and the terms which they are to serve, are also prescribed. MISS. CODE ANN. § 9-3-65 (Supp. 1975). The new procedure also provides for the selection of a chairman, vice-chairman, and other necessary persons to assist the committee. *Id.* § 9-3-67.

[35] *See* Ethridge, *supra* note 3, at 513; *Forty-Second Annual Meeting, supra* note 4, at 514-15.

[36] Legislative and lay representation, as well as representation of the press, had been suggested in the past. *See Forty-Second Annual Meeting, supra* note 4, at 514-15.

It is interesting to note Justice Ethridge's position as to the role of the legislature: "I would propose . . . a provision creating a Judicial Council, requiring no implementation by the legislature, except directing it to provide adequate funds for its support." Ethridge, *supra* note 3, at 513.

[37] MISS. CODE ANN. §§ 9-3-69 (Supp. 1975).

[38] *Id.* § 9-3-69.

[39] *Id.*

[40] 308 So. 2d at 78.

it is the proper body, and *sole* body, to promulgate rules of judicial procedure.[41]

II. Procedural Reform in Other States

To preface the discussion of the proposed procedural rules for Mississippi, an examination of the procedural rules and rulemaking systems in some other jurisdictions may help to put the proposal in perspective.

A. Alabama: Radical Reform in Our Sister State

In 1971, the Alabama Legislature passed an act similar to Mississippi's section 9-3-61, in which it granted the Alabama Supreme Court the power to promulgate *and adopt* rules of civil procedure.[42] The only restriction imposed by the Alabama Legislature was that the adopted rules "not abridge, enlarge or modify the substantive right of any party."[43]

Not surprisingly, prior to 1971 the calls for procedural reform in Alabama had been very similar in substance and duration to those voiced in Mississippi.[44] In response, the Alabama Legislature provided a rulemaking power broader than that granted in Mississippi.[45] However, it is the *judicial* response that is of more interest here—the Alabama court's adoption of a modified version of the Federal Rules of Civil Procedure.[46] Although the legislative grant of rulemaking power to the

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[41] See text accompanying notes 23 & 24 *supra*.

[42] Ala. Code tit. 13, § 17 (2)(1) (Supp. 1973). For a thorough discussion of the history of the Alabama Supreme Court's rule-making power, see Heflin, *"Rule-Making Power,"* 34 Ala. Law. 263 (1973). (The author is Chief Justice of the Alabama Supreme Court.)

[43] Ala. Code tit. 13, § 17 (2)(1) (Supp. 1973). The Mississippi procedure, in similar language, provides that "[r]ules prescribed pursuant to this act shall not abridge, enlarge or modify any substantive right of any litigant . . . ." Miss. Code Ann. § 9-3-63 (Supp. 1975). This criterion is a sufficient safeguard against judicial overreaching.

[44] *See, e.g.*, Skinner, *Stagnation or Modernization: Alabama's Procedural Crises*, 32 Ala. Law. 128 (1971). ("[M]eritorious claims and defenses [are] sacrificed upon the chopping block of procedural technicalities.") One author, advocating adoption of the federal rules, noted that their use would permit law schools to spend less of their limited time "on the encrusted and detailed anachronisms of Alabama procedure." Rendleman, *More on Procedural Reform*, 33 Ala. Law. 37, 44 (1972). Since successful completion of Mississippi practice and procedure courses is a prerequisite to graduation from the University of Mississippi School of Law, this argument has at least some merit in this state.

Another writer posed the question: "[W]hy should we . . . develop a system requiring independent specialization and study only to be useless when we cross the street from the County Court House to the Federal Building?" Lyons, *Proposed Rules of Practice in Alabama*, 33 Ala. Law. 285, 290 (1972).

[45] See note 42 and accompanying text *supra*.

[46] Comment, *The Effect of the Alabama Rules of Civil Procedure on the Scintilla of Evidence Doctrine*, 4 Cumber.-Sam. L. Rev. 75 (1973).

Alabama Supreme Court did not provide for an advisory committee, that court by order created a 15-member Advisory Committee on Civil Practice and Procedure.[47]

As the reporter for the Advisory Committee noted, the areas of Alabama civil procedure most in need of reform were pleading, joinder of parties, and forms of action.[48] The Alabama Rules of Civil Procedure, adopted in 1973,[49] did for the most part what was hoped would be done. Notice pleading replaced fact pleading: no cause of action need be stated, only a showing of entitlement to relief and a demand for that relief.[50] Joinder was liberalized to resemble closely the federal rules provisions.[51] A single form of action known as a "civil action" was provided for, replacing the separate forms of "law" and "equity."[52] In addition, the demurrer was replaced by the motion to dismiss,[53] and construction of pleadings liberalized to favor the pleader.[54] Pretrial discovery[55] and pretrial conferences,[56] both similar to the corresponding federal rules, were also provided for.

Although not binding on any court, the advisory committee's comments, appearing after each respective rule discussed, should greatly aid the implementation and use of the new rules.[57] Moreover, to ensure continued flexibility, a standing committee was created by the Alabama

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[47] Alabama Supreme Court Resolution and Order Creating the Advisory Committee on Civil Practice and Procedure, October 11, 1971, *cited in* Donaldson, *The Alabama Supreme Court Advisory Committee on Civil Practice and Procedure*, 4 CUMBER.-SAM. L. REV. 210, 212 (1973). Professor Donaldson, who served on the advisory committee and the subsequently created standing committee, discussed the advisory committee's comments and actions on most of the 86 rules considered.

[48] Lyons, *supra* note 44, at 285-88.

[49] See note 45 *supra*.

[50] Melton, *Speedy, Inexpensive, Justice*, 34 ALA. LAW. 276, 277 (1973).

[51] Donaldson, *supra* note 47, at 242 (adopted after minimal discussion).

[52] ALA. R. CIV. P. 2. This was expressly authorized in the legislative grant of rulemaking power. *See* ALA. CODE tit. 13, § 17 (2)(2) (Supp. 1973):

> [T]he supreme court shall have the power to provide for one form of civil action and procedure for the trial of cases both at law and in equity; provided, however, that equitable rights as at common law and declared by the supreme court of Alabama shall be preserved to the parties inviolate . . . .

[53] ALA. R. CIV. P. 12.

[54] *Id.* 8.

[55] *Id.* 26-37. A discussion of these rules was presented at a circuit judges seminar as part of the systematic education plan on the new procedural rules, discussed in text accompanying note 59 *infra*. This presentation was later published as Conway, *Depositions and Discovery*, 34 ALA. LAW. 298 (1973). The author was a member of both the advisory and standing committees. *See also* Hare, *Discovery Under the New Alabama Rules of Civil Procedure*, 4 CUMBER.-SAM. L. REV. 262 (1973).

[56] ALA. R. CIV. P. 16; *see* Futrell, *The Pre-Trial Conference*, 34 ALA. LAW. 306 (1973).

[57] *See* Melton, *supra* note 50, at 277.

Supreme Court to replace the advisory committee and monitor the rules of procedure, reporting changes to the court as they appear necessary.[58]

One of the most notable aspects of implementation of Alabama's new rules of procedure is the scope of the efforts taken to educate those involved on the application of the rules.[59] Every available resource was put to the task, including telecasts of panel discussions on the rules over the state's educational television system.

The progress made in Alabama is commendable. That state's rules of civil procedure are now comparable to the federal rules. This facilitates both learning and uniform application; yet the adopted rules retain some of those provisions the state practitioner prefers, making the rules unique to Alabama.

B. Georgia: Perspectives of the Civil Practice Act

The procedural rulemaking power of the Georgia Supreme Court, acquired in 1945,[60] is subject to legislative control by approval or disapproval similar to that prescribed by Mississippi's section 9-3-71.[61] Rules adopted by the Georgia court must first be submitted to the general assembly and become effective only upon ratification and confirmation.[62] The Georgia grant of rulemaking power was not, however, without retention of the same power in the general assembly; the grant was not "an abandonment or disclaimer of the power of the General Assembly to enact laws regulating procedure . . . ."[63]

The Georgia court's initial response to the grant of rulemaking power was to appoint a committee composed of members of the state bar to assist in the promulgation of a new system of civil procedure.[64]

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[58] *See* Donaldson, *supra* note 47, at 258-59. The Advisory Committee in Mississippi will be a continuing body of unlimited life. MISS. CODE ANN. § 9-3-65 (Supp. 1975). Should the Mississippi Supreme Court adopt, with or without legislative approval, a comprehensive code of procedure, however, a smaller though ably-qualified body may become a more realistic monitoring device.

[59] *See* Heflin, *Forward: The New Alabama Rules of Civil Procedure*, 4 CUMBER.-SAM. L. REV. 207 (1973). (The author is Chief Justice of the Alabama Supreme Court.) Some of the means utilized to educate the bench and bar included preadoption programs, seminars, "cram-courses," postadoption programs, and law review symposia. *Id.*

[60] *See* GA. CODE ANN. § 81-1501 (1956).

[61] *Id.* § 81-1502.

[62] *Id.* The Georgia statute does not prescribe specific time periods for submission or legislative confirmation, as does the Mississippi statute; the rules are only to be "reported by the court to the Generaly [*sic*] Assembly at the next regular [or extraordinary] session therof . . . to consider and ratify them." *Id.*

[63] *Id.* § 81-1505. As will be seen below, this clause became an important mechanism in the adoption of the Georgia Civil Practice Act. See text accompanying notes 69 through 72 *infra*.

[64] The Georgia statute left the court free to determine the number and qualifications

This committee submitted a report to the Georgia court, which in turn submitted it to the general assembly "to become effective on January 1, 1947, subject nevertheless to ratification and confirmation" as provided in the act.[65] The general assembly ratified the report, consisting of 26 rules of civil procedure.[66] The rules of procedure were to be monitored by a judicial council[67] which was later supported by an administrative office.[68]

During the 20 years following the adoption of the initial set of court-made, assembly-ratified rules, however, the Georgia court apparently developed a "reluctance . . . to participate in the rule-making process."[69] Then, in 1966, the Trial Procedure Committee of the Georgia Bar Association drafted the Georgia Civil Practice Act,[70] relying heavily upon the Federal Rules of Civil Procedure. The close similarity of the Georgia Civil Practice Act [CPA] to the federal rules caused it to be published as a separate title of the Georgia code with a numbering system corresponding to that of the federal rules.[71] Thus, the retention of rulemaking power by the Georgia General Assembly proved necessary to supplement the existing but stagnant court-held power. The CPA, however, did not revoke the Georgia court's rulemaking powers;[72] perhaps this action by the bar and assembly will serve to remind the court of its rulemaking function.

The CPA made many major changes in Georgia civil procedure.[73] As in Alabama,[74] the dual forms of civil action, law and equity, were

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of the advisory committee; the only restriction was that the members selected belong to the Georgia bar. *See id.* § 81-1504.

[65] See the editorial note following section 81-1507, GA. CODE ANN. at 642 (1956), *quoting* Georgia Supreme Court Orders of Jan. 12, 1946.

[66] See Resolution of Feb. 1, 1946 (Acts 1946, p. 726), *cited in* the editorial note following section 81-1504, Ga. Code Ann. at 640 (1956).

[67] Ga. Code Ann. §§ 81-1601 to -1607 (1956) (repealed by Ga. Acts 1973). The council had many other duties, e.g., studying court organization, court administration, bar admission, and attorney conduct. *Id.* § 81-1606 (repealed).

[68] GA. CODE ANN. § 81-1603 (Supp. 1974).

[69] Leverett, *The 1967 Amendments to the Georgia Civil Practice Act and the Appellate Procedure Act*, 3 GA. ST. B.J. 383, 384 (1967).

[70] GA. CODE ANN. tit. 81A (1972). The impetus for reform of Georgia civil procedure began after a 1964 poll showed 2565 bar members favoring reform compared with 287 against. *See* Rees, *The Georgia Civil Practice Act of 1966: Preliminary Observations*, 2 GA. ST. B.J. 419 (1966).

[71] *See* Leverett, *Comments on the Georgia Civil Practice Act of 1966*, 3 GA. ST. B.J. 295 (1966) (rule-by-rule comparison of CPA and Federal Rules of Civil Procedure).

[72] GA. CODE ANN. tit. 81A, app. A (1972).

[73] These changes are summarized in Rees, *supra* note 70, at 420-31. *See also* Leverett, *supra* note 71, at 296-319.

[74] See text accompanying note 52 *supra*.

replaced by one "civil action."[75] Notice pleading was adopted[76] and demurrers and special pleas were abolished.[77] Joinder[78] and amendments to pleadings[79] were liberalized. As was done in Alabama, the CPA retained several, though usually minor, vestiges of the old system.[80]

The necessity for several amendments to the CPA became apparent before its enactment, and to permit these to be published and circulated in advance, the effective date of the CPA was postponed until September 1, 1967.[81] The Trial Procedure Committee of the bar, by maintaining its watch on the progress of the CPA throughout the adoption process, was able to simplify incorporation of these amendments into the act without undue delay. In that same spirit, the bar's standing committee on law revision in 1972 recommended the modification of certain sections of the CPA to keep that act abreast of amendments to the federal discovery rules.[82]

Whether the Georgia Judicial Council, or its administrative staff, actively functions in a monitoring capacity is uncertain. While this is unfortunate in some respects, it is not catastrophic. The aggressive way in which the Georgia Bar Association has responded to the procedural requirements of the state and the cooperative, progressive attitude of the respective committees of the bar and legislature instill confidence that Georgia will maintain a responsive procedural system for trial of its civil cases.

C. Tennessee: Federal Influence On A Functional System

A comparatively early legislative grant of procedural (civil and criminal) rulemaking power to the Tennessee Supreme Court required no legislative ratification of rules adopted by the court.[83] Rules prescribed by the court required unanimous approval of all justices and automatically took effect 6 months following adoption by the court.[84] At the same time, circuit and chancery courts were authorized to make

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[75] GA. CODE ANN. § 81A-102 (1972).

[76] *Id.* § 81A-108(a).

[77] *Id.* § 81A-107(c).

[78] *Id.* §§ 81A-118 to -120.

[79] *Id.* § 81A-115.

[80] *See, e.g., id.* § 81A-112(a) (time for serving defensive pleadings); *id.* § 81A-141(a) (when voluntary dismissal permitted).

[81] *See id.* § 81A-186(a). Subsection (b) provides for retroactive application of the CPA when it would serve to validate something which would otherwise be invalid but not when it would have the opposite effect or "impair vested rights." *Id.* § 81A-186(b).

[82] *1971-72 Section and Committee Reports*, 9 GA. ST. B.J. 223 (1972) (report of the Law Revision Committee).

[83] Tenn. Code Ann. § 16-513 (1955) *repealed by* Tenn. Acts 1965, ch. 227, § 8.

[84] *Id.*

"rules of practice . . . consistent with law, and with such rules as may be made by the Supreme Court . . . ."[85]

In 1965, this judicial rulemaking power was modified by the Tennessee General Assembly to institute legislative ratification of rules prescribed by the court.[86] Unlike the Mississippi provision requiring that proposed rules be prefiled 120 days before the start of a regular session,[87] the Tennessee statute permits the chief justice to submit proposed rules to the general assembly while a regular session is in progress.[88] Likewise, the Tennessee General Assembly is under no time limitation in which to ratify or reject the court's proposed rules. It is conceivable that a rule, promulgated by the Tennessee Supreme Court and approved by both houses of the Tennessee General Assembly, could be in effect almost immediately after adoption by that court, whereas a similar rule in Mississippi will most likely require 2 years to become effective.[89]

The Tennessee provision for an advisory commission closely resembles that of Mississippi,[90] with the size, terms of members, and authority for supportive personnel expressly provided.[91] Apparently, however, the Tennessee court has the discretion to appoint members with whatever background and qualifications it desires.[92]

Although Tennessee lawyers apparently were not as dissatisfied with their system of civil procedure as Mississippi lawyers have been,[93] the Tennessee General Assembly nevertheless saw fit in 1970 to approve

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[85] *Id.* §§ 16-514, 16-627 *repealed by* Tenn. Acts 1965, ch. 227, § 8.

[86] TENN. CODE ANN. §§ 16-112 to -118 (Supp. 1974). The court is authorized to fix the effective date of prescribed rules, assuming of course that legislative ratification occurs prior to such date. *Id.* § 16-114.

[87] See note 27 *supra*.

[88] TENN. CODE ANN. § 16-114 (Supp. 1974). Rules may not be submitted later than the first day of February during such session. *Id.*

[89] See note 27 *supra*.

[90] *Compare* TENN. CODE ANN. § 16-118 (Supp. 1974), *with* MISS. CODE ANN. §§ 9-3-65 to -67 (Supp. 1975).

[91] TENN. CODE ANN. § 16-118 (Supp. 1974). The Tennessee committee is composed of nine members selected by the court to serve staggered terms.

[92] The Mississippi statute prescribes the qualifications of each member of the committee, and the court is to select only 3 of the 14 members. MISS. CODE ANN. §§ 9-3-65 to -67 (Supp. 1975).

[93] *See, e.g.*, Armstrong, *Tennessee Procedure Should Be Studied: A Modest Proposal*, 16 TENN. L. REV. 379 (1940); McKay, *Voluntary Dismissals and Non-Suits in Tennessee*, 15 TENN. L. REV. 787 (1939).

> Our Tennessee procedural system as a whole is the gradual development of generations of experience. It is well understood. It has been tested by time and trial and only in rare instances has it been found wanting. Nevertheless there are defects which well may be remedied while the whole subject is actively before us.

Id.

the adoption of the Tennessee Rules of Civil Procedure,[94] effective January 1, 1971. Of particular relevance to Mississippi practice is the effect adoption of these rules had on a system still having separate law and equity courts. Jurisdiction and venue of the circuit and chancery courts were not altered: "The rules simply provide a standard form of procedure to be used . . . ."[95] Should the same interpretation be applied in Mississippi, continuing the separation of law and equity courts would present no obstacle to adoption of the federal rules here also.

A second point of special interest concerns the form of pleadings. The Tennessee Supreme Court, for reasons undisclosed, desired retention of fact pleading rather than the adoption of notice pleading under the federal rules.[96] While not indicated on the face of the rule that such was intended,[97] the committee comments following that section indicate that the complaint should conform "more nearly to . . . chancery, [fact pleading], than to the law practice."[98]

The rules as to joinder of parties[99] and claims[100] were liberalized in accordance with the federal rules, as was the rule on amendments of pleadings.[101] Demurrers and special pleas were abolished in favor of the motion to dismiss.[102] The federal rule on summary judgment was adopted since no comparable Tennessee procedure existed prior to adoption of the new rules.[103] The discovery portion of the rules was, for the most part, adopted by Tennessee earlier as the 1959 Deposition Act,[104] but the 1970 rules contained additions pertaining to discovery that were important to the trial lawyer.[105]

An analysis of Tennessee's move to adopt the federal rules as a practical matter illustrates that even a set of procedural rules accepta-

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[94] The text of the rules of civil procedure appear in volume 1 TENN. CODE ANN. 189 (Supp. 1974). The numbering corresponds to that of the Federal Rules of Civil Procedure.

[95] Paine, *Recent Developments in Tennessee Procedure: The New Tennessee Rules of Civil Procedure*, 37 TENN. L. REV. 501, 501-02 (1970). *See also* Phillips, *Civil Procedure and Evidence—Tennessee Survey 1970*, 38 TENN. L. REV. 127 (1971) (case analysis of new rules).

[96] Paine, *supra* note 95, at 508.

[97] TENN. R. CIV. P. 8.01 (Supp. 1974). Compare the language of this rule with that of the corresponding federal rule, FED. R. CIV. P. 8(a).

[98] TENN. R. CIV. P. 8.01 Committee Comment (Supp. 1974).

[99] *Id.* 20.01.

[100] *Id.* 18.01.

[101] *Id.* 15.01.

[102] *Id.* 7.01-.03.

[103] Paine, *supra* note 95, at 516.

[104] TENN. CODE ANN. §§ 24-1201 to -1219 (Supp. 1971), *repealed* Tenn. Acts 1972 (Adj. S.), ch. 565, § 1.

[105] *E.g.*, TENN. R. CIV. P. 26.04 (Supp. 1974) (deposition admissible as evidence if deponent is more than 100 miles away from place of trial).

ble to the practicing bar can be improved by a "check up" comparison with the federal rules. Defederalization of the rules for state use does not appear difficult, and those idiosyncrasies of state practice sought to be retained usually can be.

D. Other Jurisdictions

The preceeding discussion concerned jurisdictions having various similarities with Mississippi civil practice regarding procedural rules, rulemaking, and judicial structure. Each jurisdiction also had its individual practices which it kept despite adoption of the federal rules. The other states adopting, in whole or in part, the federal rules, or promulgating a set of rules relying on the federal rules as a standard, have had much the same experience.

Confining study primarily to the remaining southeastern states, a look at the Arkansas system discloses a legislative refusal to vest procedural rulemaking power in the supreme court.[106] The Arkansas Legislature has, however, continually updated its rules of procedure so that they are comparable in many aspects to the federal rules.[107] Furthermore, it has been noted that some Arkansas rules are even more liberal than the federal rules.[108] In view of the progressiveness of the Arkansas Legislature toward modernization of procedural rules, that state's supreme court may be denied a rulemaking function for some time to come.

The Florida Supreme Court gained rulemaking power first by statute, and later by constitutional amendment.[109] Despite its acquisition of rulemaking power, the Florida Supreme Court indicated an early reluctance to adopt the federal rules, and its 1954 procedural rules, which retained the separate forms of civil actions, were merely " 'similar' to certain of the federal rules."[110] The 1954 rules were revised in 1966, effective January 1, 1967.[111] These revised rules adopted many federal rules previously not incorporated in the Florida rules. Because the law and equity forms of action were merged, a new numbering system was

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[106] 1 C. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 9.4 (C. Wright ed. 1960) [hereinafter cited as BARRON & HOLTZOFF].

[107] *Id.* For instance, the Arkansas rules on discovery closely resemble the federal rules, and it is likely that the Arkansas legislature will adopt the 1970 amendments to the federal discovery rules. *Cf.* 24 ARK. L. REV. 535 (1971).

[108] 1 BARRON & HOLTZOFF, *supra* note 106, § 9.4 (counterclaim rule).

[109] *Id.* § 9.109, *citing* FLA. CONST. art. 5, § 3 (amended Nov. 6, 1956).

[110] 1 BARRON & HOLTZOFF, *supra* note 106, § 9.10.

[111] Order of the Florida Supreme Court, June 15, 1966, 187 So. 2d 598 (Fla. 1966).

used.[112] Borrowing the idea from a well-known treatise,[113] the new rules are prefaced by a "Time Table for Lawyers," which "indicates the time for each of the steps of a civil action as provided by the [Florida] rules."[114] Authors' comments, which appear after each rule, compare the new provision with the old Florida rule and, often, with the appropriate federal rule. Undoubtedly, these comments facilitated the implementation of the new provisions and are a recommended feature of any new set of procedural rules.

Because of its civil law system, Louisiana presents a unique situation regarding procedural reform as it relates to the federal rules. While "complete adoption of the federal rules [is] not possible,"[115] the Louisiana Code of Civil Procedure enacted in 1960 went as far as possible under the circumstances.[116]

By 1960, 19 jurisdictions had adopted rules similar to the federal rules, with several others adopting particular portions of the federal rules.[117] Since that date, many more jurisdictions have enacted or substantially adopted the federal rules.[118] Vesting the rulemaking power in the courts has not always assured that the federal rules would be followed, though the trend is certainly in that direction. Bar associations, alert to the need for procedural modernization, have maintained steady pressure on those legislatures retaining rulemaking power to conform as far as is practicable to the influence of the federal rules.

III. How Radical Are the Rules?—A Comparison of the Federal Rules and Current Mississippi Practice

The writers who made their pleas for procedural reform in Mississippi pointed out three areas in which reform was most desperately

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[112] Authors' Introduction, Fla. Rules Civ. P. V, VI (1967). The numbering system, however, does *not* follow that of the federal rules.

[113] 1 Barron & Holtzoff, *supra* note 106 (nonpaginated insert).

[114] 30 Fla. Stats. Ann. XXIX (1967).

[115] 1 Barron & Holtzoff, *supra* note 106, § 9.19.

[116] Louisiana State Law Institute, *Report to Accompany the Project of the Proposed Louisiana Code of Civil Procedure* in La. Code Civ. Pro. Ann. XI, XIII (West 1960):

> The Law Institute . . . has adapted the rules proposed in this *project* to the Federal Rules of Civil Procedure whenever it could do so without violating the settled and basic theory of the procedural concepts of Louisiana. The recommended synchronization of these dual systems of procedure will result in a highly desirable similarity, but not in complete identity (emphasis in original).

[117] 1 Barron & Holtzoff, *supra* note 106, § 9.

[118] *See id.* §§ 9.1-9.53 (Supp. 1974). Even this compilation is not up to date, and referral to each state's individual rules is necessary to determine the exact status and relation to the federal rules.

needed—pleading, joinder of parties and actions, and discovery.[119] By enacting new rules of discovery,[120] the Mississippi Legislature corrected the third of these problem areas; the adopted procedures, significantly, were drawn from the Federal Rules of Civil Procedure in nearly verbatim form.[121] While several provisions of the Mississippi act were not drawn from the discovery section of the federal rules, nevertheless these sections conformed to the general rules on time and notice.[122] Of the several systems of procedure adopted across the nation, the overwhelming number of states have chosen, for all or part of their codes of procedure, to follow the federal rules.[123] This may be explained on three grounds: First, the rules form a readily available, well-established, documented, and easily copied system; second, the rules, when adopted by the state, provide a uniformity with the federal system which has advantages for both the bench and bar by eliminating confusion and the inevitable infusion of elements of each system into the other; and third, the rules provide a system which is fair, flexible, and simple. Thus, the rules furnish advantages benefitting the courts, attorneys, and clients. In selecting a system of procedure all three justifications should be considered, but greatest emphasis should be given the third element.

This section is concerned with a comparative analysis of current Mississippi practice with the federal rules. Its purpose is frankly polemical: The writers hope to show how similar Mississippi procedure is to federal practice in many areas, how dissimilar in others, how inadequate in some, and how antiquated in many—all to justify the argument that a system of rules like the federal rules should be adopted in Mississippi. This, then, will not be an exhaustive treatment of either system; accordingly, it should be read in light of its ultimate purpose.

One of the strongest arguments that has been raised against adoption of the federal rules in Mississippi has always been the effect of rule 2 on the federal system and the fear of its impact on Mississippi's bifurcated judicial system. Rule 2 provides: "There shall be one form of

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[119] See authorities cited in notes 1 & 3 *supra*.

[120] MISS. CODE ANN. §§ 13-1-201, -226 to -237, -241, -243 (Supp. 1975).

[121] *See* FED. R. CIV. P. 26-37; Pyle, Ott & Rumfelt, *supra* note 2.

[122] *Compare* MISS. CODE ANN. § 13-1-241 (Supp. 1975), *with* FED. R. CIV. P. 5, 6(e). *See also* Pyle, Ott & Rumfelt, *supra* note 2, at 783.

[123] Jurisdictions adopting rules substantially similar to the federal rules include: Alaska, Arizona, Colorado, Delaware, District of Columbia, Hawaii, Idaho, Kentucky, Maine, Minnesota, Nevada, New Jersey, New Mexico, North Dakota, Puerto Rico, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Five states formulated their own rules but drew heavily on the federal rules: Florida, Iowa, Missouri, Pennsylvania, and Texas. Seven states have adopted the rules on discovery, joinder, or both: Alabama, Arkansas, California, Connecticut, Illinois, Louisiana, and New York. 1 BARRON & HOLTZOFF, *supra* note 106, at 80; *Id.* 5-8 (Supp. 1974).

action to be known as a 'civil action.' " The widely held supposition is that this rule caused the fusion of law with equity in the federal courts. However, there were never separate federal law and equity courts, merely separate sides of the same court.

The fusion of these separate "sides" of the court began with the Federal Equity Rules of 1912.[124] Equity Rule 22 provided for transfer of an action, erroneously commenced as a suit in equity, to the law side of the court.[125] This provision was extended and broadened by the Law and Equity Act of 1915[126] providing for the transfer of an action erroneously begun on the law side to the equity side and further providing for the cognizability of equitable defenses and the granting of equitable relief in actions at law. Mississippi's Constitution contains similar transfer provisions;[127] it also provides that equitable relief may be granted by the circuit court in cases at law.[128] However, there are certain actions which only the circuit or chancery court may hear. The Mississippi Supreme Court has held that decisions in one court on certain matters over which the other has exclusive jurisdiction are null and void.[129]

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[124] *See generally* 2 J. MOORE, FEDERAL PRACTICE ¶ 2.05 (2d ed. 1974).

[125] Compare this rule with MISS. CONST. art. 6, § 162, which provides: "All causes that may be brought in the chancery court whereof the circuit court has exclusive jurisdiction shall be transferred to the circuit courts."

[126] Act of March 3, 1915, ch. 90, 38 Stat. 956.

[127] *Compare* the Law and Equity Act of 1915, *with* MISS. CONST. art. 6, § 157. ("All causes that may be brought in the circuit court whereof the chancery court has exclusive jurisdiction shall be transferred to the chancery court.") Mississippi follows the rule that an action may be transferred from circuit to chancery or chancery to circuit only once. Warner v. Hogin, 148 Miss. 562, 114 So. 347 (1927). This is to prevent the courts from making a "football of a case by kicking it back and forth from one to the other." *Id.* at 567, 114 So. at 348.

[128] MISS. CONST. art. 6, § 147 provides:

> No judgment or decree in any chancery or circuit court, rendered in a civil cause, shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction . . . .

The Mississippi Supreme Court has said that

> [t]he effect of section 147 of the Constitution is to give the circuit court power to administer equity in cases arising in that court, and, if the judge of the circuit court elects to do so, this court cannot reverse for that reason alone . . . . If the right result is reached, although the case was in the wrong court, the judgment will not be disturbed.

Dilworth v. Federal Reserve Bank, 170 Miss. 373, 388, 150 So. 821, 824 (1933), *rev'd on other grounds*, 154 So. 535 (Miss. 1934).

[129] MISS. CONST. art. 6, § 147 will control only under two conditions: (1) The cause must be a civil cause, and (2) jurisdiction over the subject must arise from equity or the common law. See note 128 *supra*. Thus, all criminal trials and all civil actions where jurisdiction is granted by statute or by the constitution to one court must be heard in that court alone. *See, e.g.*, Board of Levee Comm'rs v. Brooks, 76 Miss. 635, 25 So. 358 (1899).

It appears that the Mississippi procedure is similar to the prerules federal procedure. Rule 2 completely eliminated the distinction between the "law side" and the "equity side" of the court. This fusion is entirely justified by the federal system, but no such general union need be undertaken in Mississippi. Generally, the federal courts do not take cognizance of such matters as divorce and alimony, minor's business, or wills and administration, all which are regarded as purely local by the federal courts.[130] Such matters require the more flexible approach traditionally found in the courts of chancery and they are vested in our chancery courts by the Mississippi Constitution.[131] This does not mean that both courts would not benefit from a single, simple form of pleading and procedure; any reform of procedure should be uniform in all courts in the state. The remainder of this section will examine the mechanics of the federal system and compare it to Mississippi procedure.

A. Commencement of Action: Service of Process, Pleadings, Motions, and Orders.

Federal rule 3 provides: "A civil action is commenced by filing a complaint with the court."[132] It is contemplated that summons will issue immediately upon filing.[133] This is the same procedure followed by Mississippi in the circuit, chancery, and county courts.[134] The form of the summons is the same in both state and federal procedure,[135] and both provide for service by an officer of the court.[136] The requirements of personal service are substantially identical.[137] Additionally, the federal

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[130] *See, e.g.*, Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 383 (1930); Sutton v. English, 246 U.S. 199, 205 (1918); *In re* Burrus, 136 U.S. 586, 594 (1890); Giles v. Little, 134 U.S. 645, 648-49 (1890).

[131] MISS. CONST. art. 6, § 159 provides:

> The chancery court shall have full jurisdiction in the following matters and cases, viz.:
>
> (*a*) All matters in equity;
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> (*b*) Divorce and alimony;
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> (*c*) Matters testamentary and of administration;
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> (*d*) Minor's business;
>
> (*e*) Cases of idiocy, lunancy, and persons of unsound mind . . . .

[132] "Filing with the court" is defined by FED. R. CIV. P. 5(e). *See also* Greeson v. Sherman, 265 F. Supp. 340, 342-43 (W.D. Va. 1967).

[133] FED. R. CIV. P. 4(a).

[134] *See* MISS. CODE ANN. §§ 11-7-33, 11-9-105, 13-3-5 (1972); Shackelford v. New York Underwriters Ins. Co., 189 Miss. 396, 198 So. 31 (1940).

[135] FED. R. CIV. P. 4(b); MISS. CODE ANN. §§ 13-3-3 to -5 (1972).

[136] FED. R. CIV. P. 4(c); MISS. CODE ANN. §§ 13-3-77 to -83, 19-25-37 (1972).

[137] *Compare* FED. R. CIV. P. 4(d), *with* MISS. CODE ANN. §§ 13-3-17, -33, -41 to -57, -61, -63 (1972).

rules provide that service of nonresidents is to be made in accordance with state provisions for long-arm service and service by publication.[138] The federal rules also provide for personal service of third-party defendants[139] and indispensable parties[140] outside the state if within 100 miles of the place where the action was commenced.[141] Such extraterritorial service would likely be unavailable to a state court due to its lack of jurisdiction beyond the borders of the state, but such persons may often be reached by long-arm or nonresident motorist provisions.[142]

Rule 5 concerns "Service and Filing of Pleadings and Other Papers." Under rule 5, all pleadings must be served upon each party; this is a major difference from the Mississippi practice of merely filing pleadings with the court. No service need be made upon parties in default for failure to appear[143] or, in special cases involving numerous defendants, among codefendants.[144] With regard to service of orders, motions, notices of hearings, discovery papers, and other papers which require giving specific notice, the state and federal procedures are quite similar.[145] Service is made by the moving attorney upon the attorneys for the other parties, or upon the parties themselves if they have no attorney or if personal service is ordered by the court. Rule 5 also defines "filing"[146] and "filing with the court."[147] The definitions used conform to current state procedures.[148]

Rule 6 provides for computation of time; these provisions are substantially identical to Mississippi practice.[149] The rule provides a general rule for enlargement of the time periods allowed, requiring an initial showing of good cause,[150] and an additional time allowance for taking action of the service by mail.[151] Mississippi has no general rule allowing a circuit judge to enlarge time periods, although such a power would presumably reside within the chancellor's equitable discretion unless limited by statute. Neither practice allows the shortening of time peri-

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[138] FED. R. CIV. P. 4(e). Mississippi's provisions for service of process on absent or nonresident defendants are found in MISS. CODE ANN. §§ 13-3-19 to -31, -57 to -63 (1972).

[139] *See* FED. R. CIV. P. 14.

[140] *Id.* 19.

[141] *Id.* 4(f).

[142] *See* MISS. CODE ANN. §§ 13-3-57 to -63 (1972).

[143] FED. R. CIV. P. 5(a).

[144] *Id.* 5(c).

[145] *Id.* 5(a), (b); MISS. CODE ANN. §§ 11-49-11, 13-3-33, -83 (1972).

[146] FED. R. CIV. P. 5(d).

[147] *Id.* 5(e).

[148] *See, e.g., In re* Stanback, 222 So. 2d 660 (Miss. 1969).

[149] *Compare* FED. R. CIV. P. 6(a), *with* MISS. CODE ANN. §§ 1-3-67 to -69 (1972).

[150] FED. R. CIV. P. 6(b).

[151] *Id.* 6(e).

ods without the consent of both sides. The federal rule granting additional time after service by mail also conforms to the state rule.[152]

B. Pleadings and Motions

Pleadings under the federal rules are simple and strictly limited in number. Basically, the pleadings allowed are a complaint, an answer, and responses to counterclaims and cross-claims.[153] The court also has authority to permit a reply to be made.[154] Demurrers, pleas, and exceptions for insufficiency have been abolished in the federal system.[155] Pleadings are required by the federal rules to be short and concise. No technical forms are required.[156] In contrast, Mississippi adheres to the earlier forms of fact pleading, some of which have been in our practice since 1850.[157] Pleadings in our state practice are intended and required to state all of the essential facts of the cause of action or defense and failure to perform this duty may result in demurrer or an order striking the pleading.[158] Although Mississippi's general pleading statute states that "[i]t shall not be an objection to maintaining any action that the form thereof should have been different,"[159] our courts have continued to apply the ancient common law requirements when testing a declaration or complaint against a demurrer.[160]

The shift to notice pleading in the federal rules would not have been possible without the federal rules on depositions and discovery, which the Mississippi Legislature recently adopted with but one exception.[161]

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[152] MISS. CODE ANN. § 13-3-83 (1972).

[153] FED. R. CIV. P. 7(a).

[154] *Id.*

[155] *Id.* 7(c).

[156] *See id.* 7(e), (f).

[157] *See* Griffith, *The New Mississippi Civil Practice Act—Its Background and Effect*, 20 MISS. L.J. 1, 5 (1948).

[158] *See, e.g.*, City Council v. Thomas, 241 Miss. 633, 131 So. 2d 659 (1961); State *ex rel.* Booze v. Cresswell, 117 Miss. 795, 78 So. 770 (1918); Metcalfe v. Merchants' & Planters' Bank, 89 Miss. 649, 41 So. 377 (1906); Mitchell v. Southern Ry., 77 Miss. 917, 27 So. 834 (1900).

[159] MISS. CODE ANN. § 11-7-35 (1972). Section 11-5-13, which regulates the form of chancery pleading, does not contain this language; hence special demurrers for form are still in use. *See id.* §§ 11-5-15, -19 to -23.

[160] *See, e.g.*, Nasif v. Booth, 221 Miss. 126, 72 So. 2d 440 (1954); Potomac Ins. Co. v. Wilkinson, 213 Miss. 520, 57 So. 2d 158 (1952); Home Ins. Co. v. Tate Mercantile Co., 117 Miss. 760, 78 So. 709 (1917); Town of Hazlehurst v. Cumberland Tel. & Tel. Co., 83 Miss. 303, 35 So. 951 (1903).

[161] FED. R. CIV. P. 26-37; MISS. CODE ANN. §§ 13-1-201, -226 to -237, -241, -243 (Supp. 1975). Mississippi did not adopt federal rule 35 which is entitled "Physical and Mental Examination of Persons." However, the remainder of the discovery rules were enacted in nearly verbatim form.

The United States Supreme Court summarized the effect of the shift to notice pleading and discovery in *Hickman v. Taylor*:[162]

> Under the prior federal practice, the pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.[163]

The benefits of the system are several; all of them lead to a more improved system for administering justice. The Court went on to state the purpose behind the procedure:

> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[164]

Now that the discovery rules are a part of Mississippi practice, the transition from fact to notice pleading will be much easier; the chasm of tradition may be very deep but it is now very narrow.

In the same vein, the federal rules allow inconsistent claims or defenses to be set out alternately or hypothetically in one or several courts in a declaration or answer.[165] Mississippi, while operating under a statute[166] allowing alternative allegations in tort and contract in one declaration, adheres to the old rules against duplicity in pleading.[167]

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[162] 329 U.S. 495 (1947).

[163] *Id.* at 500-01.

[164] *Id.* at 507.

[165] FED. R. CIV. P. 8(e)(2).

[166] MISS. CODE ANN. § 11-7-36 (Supp. 1975).

[167] The rule against duplicity was stated in Illinois Cent. R.R. v. Abrams, 84 Miss. 456, 464, 36 So. 542, 543 (1904):

> Reversible error has been committed, plainly and flagrantly, in putting, in a declaration with but one count, two antagonistic causes of action, and in respect

Although a claim under alternative theories will not be subject to a demurrer, the plaintiff may have to choose one theory for recovery upon which the jury will be instructed, rather than allowing the jury to decide between the alternative claims.[168]

In Mississippi practice, the defendant must answer the plaintiff's charges either by admission or denials.[169] The response given must address the substance of the plaintiff's allegations or it will be deemed insufficient.[170] This puts the defendant in an untenable position when he knows nothing of an allegation in the declaration or bill of complaint; he must either admit the truth of an allegation which may in fact be false or make a false representation regarding his knowledge of the fact by making a denial without knowledge. The federal rules avoid this problem: a denial may be made based upon a lack of information of and belief in the truth of an allegation.[171] In both the federal and state

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also of the course pursued in giving instructions as to both these antagonistic causes of action under this peculiar declaration.

See also cases cited note 160 *supra. But see* Evans v. Central Serv. & Supply Co., 226 So. 2d 616, 621 (Miss. 1969) (on petition for rehearing).

[168] MISS. CODE ANN. § 11-7-36 (Supp. 1975) has yet to be subjected to supreme court review; there are conflicting cases regarding duplicity and election of remedies. The court, prior to enactment of the statute, held in Evans v. Central Serv. & Supply Co., 226 So. 2d 616, 621 (Miss. 1969) (on petition for rehearing), that two causes of action, one for breach of contract and the other for a materialman's lien, could be joined in one count and that the plaintiff may not be required to elect one theory upon which the jury will be instructed. In reaching this decision, the court overruled two contrary decisions with similar facts but made no mention of the more general rules, such as those announced in Illinois Cent. R.R. v. Abrams, 84 Miss. 456, 464, 36 So. 542, 543 (1904), where the court held that instructing the jury on both causes was erroneous. *Evans* is clearly distinguishable from *Abrams*, since the court took pains in *Evans* to show that the claims for breach of contract and for the statutory lien were consistent, while the claims in contract and in tort in *Abrams* were clearly antagonistic. Whether *Evans* is to be limited to its facts because of this is unclear, since the supreme court has not cited it in any subsequent decision.

[169] MISS. CODE ANN. § 11-7-59 (1972). Failure to respond to an allegation also acts as an admission.

[170] A denial claiming lack of personal knowledge or information and belief fails to meet the requirement of a full answer in Mississippi. *Id.* § 11-7-59(2). *See* Jones County Land Co. v. Fox, 120 Miss. 798, 83 So. 241 (1919); Applewhite v. Foxworth, 120 Miss. 388, 82 So. 264 (1919).

[171] FED. R. CIV. P. 8(b). Of course, it should be recognized that the free use of discovery should minimize the occasions when such a denial is needed. Rule 33(a) allows discovery by written interrogatories to be made from the plaintiff at any time after commencement of the action, which, as rule 3 states, occurs upon filing of the complaint. Rule 33(a) conforms to section 13-1-233(a) of the Mississippi discovery provisions. It would appear that in Mississippi, where the action commences in the same fashion, a defendant could serve the plaintiff with interrogatories with regard to those matters about which he had no information and then make his answer based upon the information obtained and beliefs thereby established.

practice affirmative matters must be pled in the answer or they will be waived and not heard at trial.[172] Also, both the federal and state provisions allow special matters which would serve to bar the action to be raised on motions and heard separately before trial on the merits.[173] Federal rule 12 provides a motion unavailable in state practice; at any time after the pleadings are closed, and before trial, any party can move for a judgment on the pleadings alone.[174] This device has the obvious advantages, when no issue of fact appears from the pleadings, of saving the time, expense, and trouble of preparing for trial of the issue, which would arise even if the parties were able to move for a directed verdict immediately upon entering the courtroom. Rule 12 also contains a provision for a motion to dismiss for failure to state a claim upon which relief may be granted.[175] Generally, this motion performs the same function as the general demurrer commonly used in our state practice.[176]

Another major distinction between the federal rules and state procedure arises in the federal practice regarding counterclaims and crossclaims and the impleading of parties under these claims.[177] Federal rule 13 provides for two kinds of counterclaims. A claim arising out of the same transaction or occurrence giving rise to the main claim *must* be asserted by the defendant in his answer or it will be barred when the main claim is settled. A claim arising out of any other transaction or occurrence may also be asserted by the defendant, but failure to assert such a claim does not prevent its adjudication in an independent action. The compulsory counterclaim is ancillary to the main claim and needs no independent jurisdictional ground.[178] However, a permissive counterclaim does not arise from the same transaction and thus would require independent jurisdictional grounds.[179] Mississippi practice provides the circuit and county courts with a rather awkward, tripartite system of counterclaim remedies: recoupment, set-off, and counterclaim.[180] Re-

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[172] *See* FED. R. CIV. P. 8(c), 9; MISS. CODE ANN. § 11-7-59(4) (1972).

[173] *See* FED. R. CIV. P. 12(b); MISS. CODE ANN. § 11-7-59(1) (1972).

[174] FED. R. CIV. P. 12(c). If extrinsic matter is introduced, the motion will be treated as one for summary judgment under rule 56.

[175] *Id.* 12(b)(6).

[176] *See* J. MOORE, *supra* note 124, at 2265-86. However, unlike a demurrer, a "speaking" motion will be transformed into a rule 56 motion for summary judgment, in the same manner as the motion for judgment on the pleadings of rule 12(c). FED. R. CIV. P. 12(b).

[177] *See* FED. R. CIV. P. 13.

[178] *See, e.g.*, United States *ex rel.* D'Agostino Excavators, Inc. v. Heyward-Robinson Co., 430 F.2d 1077, 1080-81 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

[179] There is one exception: a claim pleaded merely as a *set-off* need not meet the jurisdictional requirement. *Id.* at 1080 n.11. The general problem of jurisdiction in this situation is the failure of the claim to meet the $10,000 amount-in-controversy requirement.

[180] *See* MISS. CODE ANN. §§ 11-7-63, -69 (1972).

coupment, an ancient remedy dating from the English common law, arises in an action for unliquidated damages as a claim against the plaintiff for damages arising from the same occurence.[181] Its use has been all but forgotten in current practice due to the two statutory claims available, but it is nonetheless available. Our statutory provision for counterclaims[182] appears to include recoupment. This counterclaim is permissive in nature but must arise from the same transaction or occurrence as the main claim. Set-off must arise out of a mutual indebtedness and need not be a part of the same transaction as the main claim.[183] The chancery court is provided with only one claim in the nature of a counterclaim, the cross-bill.[184] It must arise from the same subject matter as the original bill[185] and may not be inconsistent with the answer.[186] Under both state and federal procedures, the claims asserted by the defendant may exceed the value of those asserted by the plaintiff and, if the defendant's claim is successful, he may recover the difference between his claim and that owed to the plaintiff. Federal rule 13 further provides two practices not available in circuit court. First, any party may assert any claims he has against a coparty arising out of the same transaction or occurrence as the main claim or a compulsory counterclaim.[187] Since the cross-claim is a part of the same transaction as the main claim, its jurisdiction is ancillary to the main claim and need not be independently established.[188] Cross-claims are expressly made unavailable in circuit court,[189] but a cross-bill may be filed against a codefendant in chancery practice.[190] Second, a nonparty may be joined by the defendant on a counterclaim or cross-claim for which the nonparty would also be liable.[191] Mississippi provides no specific rule allowing this practice in its statutes providing for counterclaims, set-offs, and cross-bills.

One final provision should be noted in this section. Federal rule 14 provides a procedure known as "third party practice" which is unavailable in Mississippi. Arising out of the purpose of the federal rules to facilitate disposition of cases fully and on the merits, any party subject to a claim—main claim, counterclaim, or cross-claim—may bring in by

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[181] *See, e.g.*, Howard Johnson, Inc., v. Tucker, 157 F.2d 959, 961 (5th Cir. 1946).

[182] MISS. CODE ANN. § 11-7-69 (1972).

[183] *Id.* § 11-7-63.

[184] *Id.* § 11-5-37 (Supp. 1975).

[185] *E.g.*, Dewees v. Dewees, 55 Miss. 315 (1877).

[186] Frierson v. Sheppard, 201 Miss. 603, 29 So. 2d 726 (1947).

[187] FED. R. CIV. P. 13(g).

[188] *See, e.g.*, United States *ex rel.* D'Agostino Excavators, Inc., v. Heyward-Robinson Co., 430 F.2d 1077, 1081 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971).

[189] *See, e.g.*, Rosetti v. Stein, 272 So. 2d 633 (Miss. 1973).

[190] MISS. CODE ANN. § 11-5-37 (Supp. 1975).

[191] FED. R. CIV. P. 13(h).

service of process a third party who is or may be liable to him for all or part of the relief sought. This third party defendant may assert both his own defenses to liability and any defenses that the party who brought him in (the third party plaintiff) might have asserted; the third party defendant may also counterclaim and cross-claim against plaintiff or defendant as appropriate.[192] These liberal provisions for impleader create a most effective means of disposing of a complicated series of interrelated claims by consolidating them all, thus providing for uniform decisions on all common questions of fact and law, eliminating a multiplicity of overlapping suits, allowing rendition of a single decree or judgment specifying clearly the rights and liabilities of all parties, and avoiding possibilities of multiple or inconsistent judgments of liability.

C. *Parties*

The basic rules concerning capacity to sue or be sued and suits by the real party in interest are the same in both federal and state practice and the federal rule defers to state law concerning capacity.[193] Federal practice allows a more permissive joinder of claims and remedies than the state practice[194] and even allows consecutive or contingent claims to be asserted.[195] The rules regarding necessary parties are similar in both federal and state practice. The federal rules do not refer to indispensable parties, but rather speak in terms of persons needed for just adjudication. Under federal rule 19, a person needed for just adjudication must be joined and may be joined as a defendant if, while properly a plaintiff, he refuses to join suit voluntarily.[196] Under state practice, if a necessary

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[192] *Id.* 14.

[193] *Id.* 17. *Cf.* Kansas City M. & B.R.R. v. Cantrell, 70 Miss. 329, 12 So. 344 (1893) (principal Mississippi position on real parties in interest).

[194] FED. R. CIV. P. 18(a) allows a party asserting a claim, original or secondary, to assert all claims legal, equitable, or maritime that he has against an opposing party. Essentially this allowance is made because of the union of law and equity, but such a claim would have advantages in certain claims at law for damages both from contract and tort. Rather than having to elect one remedy, the claimant could assert all of them and settle all questions in one action. Compare this with the Mississippi cases cited in note 205 *infra*.

[195] *Id.* 18(b). Under current state practice, only claims which have matured at the time of filing the original claim may be asserted. The courts class most premature claims as either declaratory judgments or advisory opinions, which they refuse to consider. *See* Hinds-Rankin Metropolitan Water & Sewer Ass'n v. St. Paul Fire & Marine Ins. Co., 289 So. 2d 904 (Miss. 1974), *citing* Cliburn v. Cliburn, 209 Miss. 631, 48 So. 2d 126 (1950); Bobo v. Christian, 199 Miss. 433, 25 So. 2d 325 (1946); White v. Franklin, 165 Miss. 729, 140 So. 876 (1932). The court in *Hinds-Rankin* did say that equity courts could give declaratory relief in the proper case, without specifying what a proper case would be.

The federal provision also affects the allowance of third party practice in rule 14. See text accompanying note 192 *supra*.

[196] FED. R. CIV. P. 19(a).

party cannot be joined, the suit must be dismissed.[197] However, the federal procedure is more liberal. Even a necessary party may be dismissed if his joinder would make venue improper and if he objects to venue.[198] Further, the action can be maintained without the necessary defendant, if he cannot be joined, when adequate relief can be formed while protecting the interests of the absent party; however, this rule only operates when no alternative remedy is available to the claimants.[199] When a known, necessary party is not joined, the claimant must plead the reasons for nonjoinder.[200] As in state practice,[201] mere misjoinder or nonjoinder of a party will not be ground for dismissal or reversal.[202]

However, the federal rules make a major shift from state practice by permitting liberal joinder of claims by or against different persons when all the claims arise out of the same transaction.[203] Under the federal rule all persons involved in the transaction or occurrence may join in asserting their claims against a defendant whether their claims are joint, several, or alternative;[204] state practice allows joinder only if the claims asserted are joint.[205]

The federal rules also provide for joinder of parties in an interpleader action.[206] This form of action is now available in chancery when it arises purely upon equitable grounds.[207] The federal procedure is available either at law or equity and presumably could be tried with a jury.[208] Unlike equitable interpleader, the plaintiff under the rule may disclaim

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[197] *E.g.*, Terry v. Unknown Heirs of Gibson, 108 Miss. 749, 67 So. 209 (1915); Gates v. Union Naval Stores Co., 92 Miss. 227, 45 So. 979 (1908); Burroughs v. Jones, 78 Miss. 235, 28 So. 944 (1900); Lemmon v. Dunn, 61 Miss. 210 (1883); *see* Smith v. W. Denny & Co., 90 Miss. 434, 43 So. 479 (1907).

[198] FED. R. CIV. P. 19(a). This rule presupposes that there is no other court to which venue could properly be changed under 28 U.S.C. § 1404(a) (1970). Such a change of venue may be made upon the motion of any party or on the court's own motion.

[199] FED. R. CIV. P. 19(b).

[200] *Id.* 19(c).

[201] MISS. CODE ANN. §§ 11-7-21 to -23 (1972).

[202] FED. R. CIV. P. 21.

[203] *Id.* 20.

[204] This, however, does not change the requirements for federal jurisdiction which allow aggregation of these claims only if a *joint* claim is asserted. *E.g.*, Pinel v. Pinel, 240 U.S. 594 (1916).

[205] *See, e.g.*, Palmer v. Clarksdale Hosp., 213 Miss. 611, 57 So. 2d 476 (1952); Henry v. Donovan, 148 Miss. 278, 114 So. 482 (1927); Louisville v. Armstrong, 113 Miss. 385, 74 So. 285 (1917); Newton Oil & Mfg. Co. v. Sessums, 102 Miss. 181, 59 So. 9 (1912); Harvey v. Eddington, 25 Miss. 22 (1852).

[206] FED. R. CIV. P. 22.

[207] *See* V. GRIFFITH, MISSISSIPPI CHANCERY PRACTICE §§ 420-26, at 413-21 (2d ed. 1950).

[208] A jury trial under the rules may be requested by a party concerning any question of fact. FED. R. CIV. P. 38.

liability to *any* claimant.[209] This interpleader may be asserted by the defendant in a counterclaim or cross-claim as well as in an independent action like equitable interpleader.[210]

The greatest difference between federal and state practice in the joinder of claims and parties lies in the class action provided in rule 23.[211] In the federal scheme the class action has become unmanageable due to the tremendous size of the class which frequently is identified in actions under rule 23(b)(3).[212] Since the United States Supreme Court has ruled that all known or readily identifiable members of one of these classes must be given the best notice practicable,[213] including personal notice when addresses are known,[214] the need for narrowing the defined class is often essential. The adoption of the class action rule in state practice would tend to limit the size of such classes and also provide a state court remedy for large classes of injured plaintiffs while eliminating duplication of suits, inconsistent results, and needless complication of settlement of disputes. Such a remedy would be useful in many areas including, notably, consumer protection, environmental protection, and state antitrust proceedings. In the same vein are the specialized rules for derivative actions by stockholders[215] and actions regarding members of unincorporated associations.[216] Unfortunately, the Mississippi Supreme Court consistently has refused to allow a class action like that under rule 23 to be brought.[217] The cases leave little hope for a class action rule to develop in Mississippi without pressure from the bar and the public. While a class-type suit is allowable in chancery on grounds of preventing multiplicity of litigation, its use is extremely limited in frequency and value.[218]

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[209] *Id.* 22.

[210] *Id.*

[211] An attempt to incorporate a comprehensive discussion of class actions into this comment would be futile. The reader is directed to the several treatises and articles on the topic. *E.g.*, 3B J. MOORE, *supra* note 124, ¶¶ 23.01 -.97 & App.; 7-7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1751-1803 (1972) and (Supp. 1974); Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 MISS. L.J. 39 (1975).

[212] *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[213] *Id.* at 175. Rule 23(c)(2) expressly provides for this requirement in classes defined under rule 23(b)(3). The Court holds this to be an inflexible requirement to maintaining the action.

[214] *Id.*

[215] FED. R. CIV. P. 23.1.

[216] *Id.* 23.2.

[217] Liddell v. Litton Systems, Inc., 300 So. 2d 455 (Miss. 1974); Barrett v. Coullet, 263 So. 2d 764 (Miss. 1972), *noted in* 44 MISS. L.J. 315 (1973); *see* Comment, *supra* note 211, at 63-67.

[218] *See* Tribette v. Illinois Cent. R.R., 70 Miss. 82, 12 So. 32 (1892), *noted in* 14 HARV. L. REV. 611 (1901); Comment, *supra* note 211, at 56-63.

D. Trials

In the federal courts, while the right to a trial by jury is preserved, a jury must be demanded by one of the parties or else it may be deemed waived.[219] The court may, on its own motion, impanel a jury either to advise or to make a conclusive judgment of the facts.[220] In Mississippi, a jury trial is automatic in circuit court,[221] and the chancellor may impanel a jury to aid him.[222] In federal practice, the parties may stipulate the issues to be decided by the jury[223] while in state court only in suits on contracts can jury trial be waived on an issue without leave of the court.[224] A selective waiver in multiple-issue litigations, while allowable in federal court, does not appear available in state court practice.

A major area in which federal practice is less liberal than state practice is in the allowance of nonsuits. In state court a nonsuit can be taken by the plaintiff, without prejudice, at any time before the trier of fact has retired to consider the decision on the merits.[225] No maximum number of voluntary nonsuits is specified, but the court has discretion to allow a nonsuit. In the federal court, however, a nonsuit can be had on the plaintiff's motion alone only before the defendant has made a response to the complaint.[226] After that time, a nonsuit may be taken only upon stipulation signed by all the parties.[227] The court must order the nonsuit and it may *not* make such an order if there is a pending counterclaim in the case which lacks independent jurisdictional grounds.[228] This last restriction would not be needed in state court, if the federal rules were adopted, since the state courts have no absolute minimum jurisdictional amount comparable to the federal district courts' $10,000 limitation. Even if the main suit were dismissed, the counterclaim could still stand in the chancery court and would stand in circuit court if it met the $200 jurisdictional amount,[229] but in any case it could be brought in *some* state court, even if only in a justice court.

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[219] FED. R. CIV. P. 38.

[220] *Id.* 39.

[221] MISS. CONST. art. 3, § 31.

[222] MISS. CODE ANN. § 11-5-3 (1972).

[223] FED. R. CIV. P. 38.

[224] MISS. CODE ANN. § 11-7-129 (1972).

[225] *Id.* § 11-7-125 (circuit court); Allison v. Camp Creek Drainage Dist., 211 Miss. 354, 51 So. 2d 743 (1951) (nonsuit permitted in chancery until the case has been submitted to the chancellor for a decision on the merits).

[226] FED. R. CIV. P. 41(a).

[227] *Id.*

[228] *Id.* 41(a)(2).

[229] This amount is derived from the circuit court's "residual" jurisdiction, as provided in MISS. CONST. art. 6, § 156, when read together with the $200 jurisdictional maximum of the justice courts set by MISS. CONST. art. 6, § 171.

The federal district court judge has greater discretion to order severances and consolidation of causes than state court judges.[230] He can also consolidate all pending trials, regardless of the parties or particular alignment of parties, when the consolidated cases involve common issues of law or fact.[231] No state rule grants this power to judges of the circuit or county courts. The chancellors might be able to exercise this power as part of their general authority to do equity. However, it may fairly be argued that it must be an inherent power of the judiciary to control the size and disposition of the docket of the court, and this power should be subject to specification by rules of the court.

Another area of distinction between the state and federal practice is the manner and freedom of issuing and serving subpoenas. In state courts, the clerk of the court issues subpoenas for all witnesses.[232] In the circuit courts requests for subpoenas must be made at least 1 week before trial,[233] and no subpoenas may be issued during trial without leave of the court.[234] In the federal court, the clerk issues the subpoena, signed, sealed, but otherwise blank, to any party requesting one.[235] Service of the subpoena may be made by the marshall or by any nonparty over the age of 18.[236] No deadline is specified for issuance of subpoenas, but the court may make any order necessary to avoid undue prejudice to any party.

The form of instructing the jury in state and federal courts is substantially similar; the only major difference lies in the time of submission of proposed instructions to the court. Under state practice, jury instructions must be submitted to the trial court at least 24 hours before the time set for trial.[237] In federal court instructions need not be submitted until the close of evidence, unless by order the court sets an earlier time.[238] Thus, the federal rules allow a party to wait until the evidence has been fully elicited before deciding upon the form of instructions most favorable to the party in light of the evidence actually developed at trial.

E. Judgments & Execution

Only two major distinctions exist between state and federal practice

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[230] *See* FED. R. CIV. P. 42.
[231] *Id.*
[232] MISS. CODE ANN. § 13-3-95 (1972).
[233] RULES OF CIRCUIT COURT PRACTICE 18 (1971).
[234] *Id.* 19.
[235] FED. R. CIV. P. 45(a).
[236] *Id.* 45(c).
[237] RULES OF CIRCUIT COURT PRACTICE 14 (1971).
[238] FED. R. CIV. P. 51.

in this area. Both merit discussion due to the importance they may have in speeding the conclusion of the process of asserting and collecting claims. The first is the process of summary judgment established by federal rule 56. No specific counterpart is available under Mississippi practice; the only similar procedure is the more time-consuming method of a trial by stipulation. The summary judgment procedure is begun by a motion for judgment in favor of the movant. This motion may be made at any time by a defending party,[239] while a claimant can make the motion only after 20 days from commencement of the action or after an adversary party has moved for summary judgment.[240] The movant may file affidavits asserting facts in support of his claim or defense; thus the motion for summary judgment differs from motions for judgment on the pleadings,[241] or to dismiss for failure to state a claim.[242] Both of these motions may be treated as motions for summary judgment if extrinsic evidence is admitted.[243] Ten days after the motion has been served a hearing may be held.[244] Prior to the hearing, parties adverse to the movant may file opposing affidavits.[245] All affidavits must be made upon *personal knowledge*.[246] The court may permit affidavits to be supported or opposed by depositions, answers to interrogatories, and further affidavits.[247] If the opposing party cannot produce affidavits, the court may, for good reasons shown, deny or continue the motion to allow time for obtaining affidavits or discovery.[248]

The grant of a motion for summary judgment is predicated upon a finding by the court that no material issue of fact exists between the parties to the motion; judgment can then be granted as a matter of law.[249] The opposing party may not defend against a supported motion by his pleadings alone; he must show specific facts creating a genuine issue of fact upon which trial is needed.[250] Affidavits must be made in good faith. A bad faith affidavit may be stricken and the affiant assessed costs or even held in contempt of court.[251] As with other judgments under

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[239] *Id.* 56(b).
[240] *Id.* 56(a).
[241] *Id.* 12(c).
[242] *Id.* 12(b).
[243] *Id.*
[244] *Id.* 56(c).
[245] *Id.*
[246] *Id.* 56(e).
[247] *Id.*
[248] *Id.* 56(f).
[249] *Id.* 56(c).
[250] *Id.* 56(e).
[251] *Id.* 56(g).

the federal rules,[252] the court may issue an appropriate order granting summary judgment on some issues and denying it on others.[253]

The summary judgment procedure has the advantage of eliminating from the trial those factors upon which no material issue actually exists, even though the parties might think there is a conflict. Thus, the issues which ultimately need to be tried in the plenary proceeding may be simplified by a summary judgment hearing held after the parties have had the opportunity to conduct discovery concerning their respective claims and defenses. By reducing the results of investigation to affidavits based upon the parties' personal knowledge, the delays which are inherent in the process of examining and cross-examining witnesses at trial are eliminated. This, by reducing both the time required at hearing and at trial on the merits, brings swifter justice to all parties.

The second major distinction in this area arises under federal rule 69 concerning execution of judgment. Both state and federal procedures establish as the basic legal process for enforcing judgment the writ of execution directing the sheriff or marshall to seize property of the judgment debtor. The federal rule applies the law of the state wherein execution is to be made in controlling the procedure for executions. However, the rule adds one factor not present in Mississippi practice: The judgment creditor may utilize the discovery procedures of the federal rules to uncover assets of the judgment debtor upon which execution may be levied.[254] In Mississippi, obtaining a judgment may be the least troublesome part of obtaining redress of an injury or grievance. The true problem quite often can be finding enough of the defendant's property or assets to satisfy the judgment obtained. Now that Mississippi has adopted the federal deposition-discovery rules,[255] the advantages of allowing discovery in aid of judgment creditors can easily be obtained.

IV. Recommendations

The primary purpose of a code of judicial procedure is to provide a framework for assuring substantial justice to all litigants. The clamor of indignation at hypertechnical legal procedures has been heard in Mississippi far too long. The era is upon us when the procedures of our distant past will continue to work injustice upon our state and its people. The question of reform, posed for so many years, must now be answered.

The first step toward an answer has already been taken in the

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[252] *See id.* 54(b).

[253] *Id.* 56(d).

[254] *Id.* 69(a).

[255] Miss. Code Ann. §§ 13-1-201, -226 to -237, -241, -243 (Supp. 1975).

adoption of the discovery rules by the legislature. A logical adjunct to this adoption is the shift in the pleading requirements from fact pleading to notice pleading. This change should be accomplished by rule, but it may be argued that the mere availability of discovery reduces, or should reduce, the requirements of pleading to notice-giving alone. This shift would work to streamline the pretrial process of demurrers, dilatory motions, and unresponsive pleading. As with the federal rules, the "niceties of pleading" should not be allowed to operate as a denial of substantial justice to the parties, a group all too often lost in our current procedural morass.

Along with notice pleading naturally comes the more easily asserted claims procedure of the federal rules. The intent and purpose of the civil legal system is to settle claims among parties. To this end the rules regarding counterclaims, cross-claims, and third-party claims should be adopted. To facilitate this, the joinder rules need to be made a part of the system as well.

An integral part of the joinder rules is the class action provision. As discussed above,[256] the class action may best be managed where the number of parties, particularly unknown class plaintiffs, can be limited in some fashion. Geographic limitation to the borders of the state appears to be a workable method, enhancing also the giving of notice by publication and pretrial publicity generally, thus aiding inclusion of the greatest number of class members. Moreover, administration of any recovery fund may be managed when the legal conflicts of administration are minimized.

As the time for trial approaches, the trial court should have the discretion to call pretrial conferences, to consolidate and sever issues to be heard, and to grant final judgment on some issues of a multifaceted litigation. In conjunction with this power there needs to be established a procedure for summary judgment similar to that of federal rule 56. Such a procedure would tend to reduce the use of dilatory motions and demurrers and would help eliminate trials on matters about which there is no real dispute.

After judgment, the enforcement of judgments could greatly be aided by providing for the use of discovery to locate the property upon which execution may be levied. This would not necessarily lead to more executions, but it would tend to be an added incentive for the judgment debtor to arrange to pay his debt rather than to rely upon the creditor's inability to locate his property. Such concealment acts as a denial of justice and should not be tolerated in our legal system.

This comment has attempted to make a survey of the status of

[256] See text accompanying notes 205 through 217 *supra*.

Mississippi civil procedure, identifying its strengths and weaknesses and proposing changes where needed. By comparing our practice with that of other states, the authors hope to provide information and incentive to nurture the spirit of reform which has recently appeared in Mississippi. We encourage the bench and bar to express their opinions and to take the lead in this reform. Silence will not bring changes; it is in the flames of debate that we must forge a new judicial tool to meet the needs of Mississippi's future.

Eric Campbell Schweitzer
Francis McRae Turner III

DUE PROCESS PROBLEMS OF MISSISSIPPI POWER OF SALE FORECLOSURE

Following the United States Supreme Court's landmark decisions in *Sniadach v. Family Finance Corp.*[1] and *Fuentes v. Shevin*,[2] both the state and federal courts became the battleground for repeated attacks on various summary remedies employed by creditors. One by one statutes governing attachment,[3] garnishment,[4] replevin,[5] sequestration,[6] landlord's liens,[7] garageman's liens,[8] innkeeper's liens,[9] self-help repossession,[10] and summary foreclosure[11] were found to contain fatal constitutional infirmities. These decisions have been the subject of extensive commentary, with scholars trying to elucidate this muddled area.[12] Moreover, recent developments, the most notable being *Mitchell v. W.T. Grant Co.*[13] and *Jackson v. Metropolitan Edison Co.*,[14] have cast doubt on the correctness of many of the lower court decisions and have

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[1] 395 U.S. 337 (1969).

[2] 407 U.S. 67 (1972).

[3] *E.g.*, Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); Schneider v. Margossian, 349 F. Supp. 741 (D. Mass. 1972); Randone v. Appellate Dep't, 5 Cal. 3d 536, 488 P.2d 13, 96 Cal. Rptr. 709 (1971), *cert. denied sub nom.*, Northern Cal. Collection Serv., Inc. v. Randone, 407 U.S. 924 (1972).

[4] *E.g.*, North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Manning v. Palmer, 381 F. Supp. 713 (D. Ariz. 1974); Olympic Forest Prod., Inc. v. Chaussee Corp., 82 Wash. 2d 418, 511 P.2d 1002 (1973).

[5] *E.g.*, Turner v. Colonial Fin. Corp., 467 F.2d 202 (5th Cir. 1972) (per curiam); Massey-Ferguson Credit Corp. v. Peterson, 96 Idaho 94, 524 P.2d 1066 (1974).

[6] *E.g.*, Garcia v. Krausse, 380 F. Supp. 1254 (S.D. Tex. 1974).

[7] *E.g.*, Hall v. Garson, 468 F.2d 845 (5th Cir. 1972); Barber v. Rader, 350 F. Supp. 183 (S.D. Fla. 1972) (per curiam); Dielen v. Levine, 344 F. Supp. 823 (D. Neb. 1972).

[8] *E.g.*, Caesar v. Kiser, 387 F. Supp. 645 (M.D.N.C. 1975); Adams v. Department of Motor Vehicles, 11 Cal. 3d 146, 520 P.2d 961, 113 Cal. Rptr. 145 (1974).

[9] *E.g.*, Collins v. Viceroy Hotel Corp., 338 F. Supp. 390 (N.D. Ill. 1972); Klim v. Jones, 315 F. Supp. 109 (N.D. Cal. 1970); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 300 N.E.2d 710, 347 N.Y.S.2d 170 (1973).

[10] Watson v. Branch County Bank, 380 F. Supp. 945 (W.D. Mich. 1974).

[11] *E.g.*, Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594 (E.D. Mich.), *appeal docketed*, No. 74-1501, 6th Cir. May 1, 1974.

[12] *E.g.*, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 Va. L. Rev. 355 (1973); Krahmer, Clifford & Lasley, *Fuentes v. Shevin: Due Process and the Consumer, A Legal and Empirical Study*, 4 Tex. Tech. L. Rev. 23 (1972); Comment, *Fuentes v. Shevin: The Constitutionality of Texas' Landlord Laws and Other Summary Procedures*, 25 Baylor L. Rev. 215 (1973); Note, *Procedural Due Process—The Prior Hearing Rule and the Demise of Ex Parte Remedies*, 53 B.U.L. Rev. 41 (1973); Comment, *Power of Sale Foreclosure After Fuentes*, 40 U. Chi. L. Rev. 206 (1972).

[13] 416 U.S. 600 (1974).

[14] 419 U.S. 345 (1974), *noted in* 16 B.C. Ind. & Com. L. Rev. 867 (1975).

caused a number of courts to reach opposite results.[15] This has led to an enormous degree of uncertainty among debtors and creditors as to the present state of the law concerning procedural due process.

This comment will study only one of these summary remedies—power of sale foreclosure as exercised in Mississippi. Current trends in the field of procedural due process will be analyzed to determine if such a remedy can withstand constitutional attack. The primary focus of the discussion will center upon the problem of finding the requisite state action needed to invoke the guarantees of the fourteenth amendment.

I. The Origin and Nature of Power of Sale Foreclosure

A. *The Common Law Origin*

Although the granting of a power to a creditor to sell a debtor's property upon the debtor's default is an ancient concept among civil law jurisdictions,[16] it is a relatively recent development in Anglo-American jurisprudence. Traditionally, English mortgages were foreclosed by the entry of a decree by a court of equity and the expiration of the mortgagor's period of redemption. The inclusion of the power of sale in the mortgage instrument was devised as a method of removing the mortgagor's equity of redemption and thereby allowing the mortgagee to sell the property free of any claims of the mortgagor.[17] At first the English courts were reluctant to recognize the mortgagor's power to release through contract his right to redeem the property from the mortgagee. Extrajudicial foreclosure steadily gained acceptance in England, however, and has progressed to the point where it is almost the exclusive method of foreclosure in modern times.[18] Today, every English mortgage

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[15] *E.g.*, Davis v. Richmond, 512 F.2d 201 (1st Cir. 1975) (Massachusetts landlord lien held constitutional); Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511 (D.C. Cir. 1974) (District of Columbia summary foreclosure held constitutional); Phillips v. Money, 503 F.2d 990 (7th Cir. 1974) (Indiana garageman's lien held constitutional); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974) (California UCC § 9-503 held constitutional); Parks v. "Mr. Ford", 386 F. Supp. 1251 (E.D. Pa. 1974) (Pennsylvania garageman's lien held constitutional); Guzman v. Western State Bank, 381 F. Supp. 1262 (D.N.D. 1974) (North Dakota attachment remedy held constitutional).

[16] *See* Ricks v. Goodrich, 3 La. Ann. 212, 213 (1848). *See also* McCall, *The Past as a Prologue: A History of the Right to Repossess*, 47 S. Cal. L. Rev. 58, 63-66 (1973).

[17] G. Osborne, Law of Mortgages § 337, at 725 (2d ed. 1970).

[18] *See* 1 G. Glenn, Mortgages § 98.1, at 611-12 (1943); G. Osborne, *supra* note 17. *See generally* 3 L. Jones, The Law of Mortgages of Real Property §§ 2286-87, at 788-92 (8th ed. 1928); Turner, *The English Mortgage of Land as a Security*, 20 Va. L. Rev. 729, 739 (1934).

Numerous authorities have interpreted Croft v. Powel, 92 Eng. Rep. 1230 (K.B. 1738)

is deemed by statute to contain a power of sale unless such power has expressly been disclaimed.[19]

The power has been a part of the American legal system since its beginning, and its validity has rarely been questioned.[20] Mississippi was among the first states to recognize it as a valid contractual power.[21] Today it has become a highly efficient, relatively inexpensive mode of foreclosure and is the preferred method in over one-half of the states.[22]

B. The Nature of the Power of Sale

The grantor's authority to convey to the trustee[23] a power to sell the encumbered property upon the grantor's default emanates from the right of a property owner to dispose of his property to the extent to which he holds title to that property.[24] Such a contractual power will not be implied from the terms of the security instrument but must be clearly expressed therein.[25] Upon default, the trustee must strictly comply with the terms of the agreement regarding the conduct of the sale or face the possibility of the sale being declared invalid; if there is a challenge to

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as questioning the validity of mortgages containing the power of sale. However, nearly 50 years before *Croft* was decided, in Bohham v. Newcomb, 23 Eng. Rep. 435 (Ch. 1684), the Court of Chancery found a conveyance greatly resembling the modern deed of trust to be valid and to cut off the grantor's right of redemption.

[19] Law of Property Act of 1925, 15 & 16 Ga. 5, ch. 20, § 101 (1)(i).

[20] *See* Turner v. Bouchell, 3 Harris & James 99 (Md. 1810); Eaton v. Whiting, 20 Mass. 513, 520, 3 Pick. 484, 491 (1826); Bergen v. Bennett, 1 Caines Cas. 1, 12, 2 N.Y. Com. L. Repts. 689, 694 (1804).

[21] Sims v. Hundly, 3 Miss. (2 How.) 896, 899 (1838). Any doubt existing after the *Sims* case was dispelled by Hyde v. Warren, 46 Miss. 13, 28-29 (1871), which also recognized the validity of the power of sale clauses.

[22] *See* Report of the Committee on Mortgage Law and Practice, *Cost and Time Factors in Foreclosure of Mortgages*, 3 REAL PROP. PROBATE & TRUST J. 413, 414 (1968); Comment, *Power of Sale Foreclosure After Fuentes*, *supra* note 12, at 210-13 & nn.29-34.

[23] The terms grantor and trustee will be used throughout this comment since the common method of securing payment of a note in Mississippi is by use of a deed of trust. The reader should assume that unless otherwise stated the same rules govern the mortgagor's and mortgagee's acts under a mortgage which provides the mortgagee with the power of sale.

[24] The right to dispose of both the possession and estate follows necessarily from the ownership of the property, and, this being so, no valid objection can be urged against incorporating the contract and power [of sale] in the same instrument with the mortgage.

Bell Silver & Copper Min. Co. v. First Nat'l Bank, 156 U.S. 470, 477 (1895), *quoting* Fogarty v. Sawyer, 17 Cal. 589, 592 (1861).

[25] *See, e.g.*, Law v. United States Dep't of Agriculture, 366 F. Supp. 1233, 1238-39 (N.D. Ga. 1973); Logan v. Short, 342 F. Supp. 1349, 1351-52 (E.D. Mo. 1972); Adams v. Boyd, 332 Mo. 484, 58 S.W.2d 704, 707 (1933); Evans v. Lee, 11 Nev. 196 (1876); Dawson v. Bauch, 149 Wis. 144, 135 N.W. 535 (1912).

the conduct of the sale the court will closely scrutinize the procedures taken by the trustee due to the immense potential for abuse.[26]

In nearly all jurisdictions the conduct of the foreclosure sale is presently governed by statute. These statutes generally prescribe the method of notice, the parties to whom notice is to be given, and the time, place, and manner in which the sale is to take place.[27] A few jurisdictions have statutorily prohibited the use of extrajudicial foreclosures,[28] and one state has prohibited the exercise of the power of sale by judicial decree.[29]

In 1840, Mississippi enacted its first legislation regulating the sale of land secured by a deed of trust.[30] This enactment, however, was repealed less than 2 years later,[31] and it was not until 1880 that the legislature again adopted a statute to regulate such sales.[32] This provision governed the sale of property under deeds which expressly granted the power of sale to the trustee but failed to dictate the manner in which the sale was to be conducted. Twelve years later a statute governing the conduct of all extrajudicial foreclosure sales was passed,[33] and the successor to that statute, section 89-1-55,[34] currently controls these proceedings. However, any of the statutory requirements, with the exception of the notice provisions, may be waived by the grantor if the intention to do so is clearly expressed in the deed of trust.[35]

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[26] *See, e.g.*, Pierson v. Fischer, 131 Cal. App. 2d 208, 280 P.2d 491, 495 (3d Dist. Ct. App. 1955), *quoting* 25 CAL. JUR. § 67, at 83; Melscheimer v. McKnight, 92 Miss. 386, 392-93, 46 So. 827, 828-29 (1908); Sanderlin v. Cross, 172 N.C. 234, 90 S.E. 213, 216 (1916).

[27] *E.g.*, GA. CODE ANN. §§ 39-1101, -0012, 67-1506 (Supp. 1974); MASS. GEN. LAWS ANN. ch. 244, §§ 10-15 (1959); S.D. COMPILED LAWS ANN. §§ 21-48-1 *et seq.* (1967); VA. CODE ANN. §§ 55-59 (1950). *See also* Report of the Committee on Mortgage Law and Practice, *supra* note 22, at 416-31; Cotellessee, *Nonjudicial Foreclosure Under a Deed of Trust: Some Problems of Notice*, 49 TEXAS L. REV. 1085, 1092-1100 (1971).

[28] ILL. ANN. STAT. ch. 95, § 23 (Smith-Hurd 1950); IND. ANN. STAT. § 32-8-11-3 (Burns 1973); IOWA CODE ANN. §§ 611.5, 654.1 (1950); N.M. STAT. ANN. § 61-7-7 (1953). In North Dakota, power of sale foreclosure is available only in very limited circumstances. N.D. CENT. CODE §§ 35-03-91.1, 35-22-01 (1972).

Oklahoma has conflicting statutory provisions; one grants the use of power of sale foreclosure, while another prohibits foreclosure without judicial decree. *Compare* OKLA. STAT. ANN. tit. 46, §§ 32-33 (1951), *with id.* tit. 12, § 686.

[29] Staunchfield v. Jeutter, 4 Neb. 847, 96 N.W. 642 (1903).

[30] Act of Feb. 21, 1840, ch. 5, § 7 [1840] Gen. Laws Miss. 25-30.

[31] Act of Feb. 14, 1842, ch. 104, § 1 [1842] Gen. Laws Miss. 232.

[32] Miss. Rev. Code § 1237 (1880).

[33] Miss. Ann. Code § 2443 (1892).

[34] MISS. CODE ANN. § 89-1-55 (1972).

[35] *See* Lee v. Magnolia Bank, 209 Miss. 804, 813-14, 48 So. 2d 515, 517 (1950); Baker v. Connecticut Gen. Life Ins. Co., 196 Miss. 701, 710-11, 18 So. 2d 438, 440 (1944).

II. Debtor's Due Process Rights

The only certainty surrounding the term "due process of law" is the fact that it is incapable of being precisely defined.[36] Despite this difficulty it has long been established that due process does require that a person be given meaningful notice and an opportunity to be heard before there is a final deprivation of life, liberty, or property by act of the state.[37] Since the United States Supreme Court's decision in *Sniadach*, this subject has become one of the most litigated areas of the law as debtors and creditors attempt to establish the extent of their rights under the fourteenth amendment.[38]

A. The Meaningful Notice Standard of Mullane v. Central Hanover Bank & Trust Co.

In *Mullane v. Central Hanover Bank & Trust Co.*,[39] the United States Supreme Court lashed out at the inadequacies of notice by advertisement. *Mullane* required the Court to examine a judicial settlement of a trustee's account in which the decree was final as to all interested parties. In finding that the advertisement was insufficient notice as to those persons whose addresses were readily ascertainable by the trustee, the Court stated that

> [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections.[40]

The Court further noted that publication may be sufficient for those

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[36] The Court has candidly admitted that "due process of law has never been a term of fixed and invariable content." FCC v. WJR, 337 U.S. 265, 275 (1949).

[37] *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Grannis v. Ordean, 234 U.S. 385, 394 (1918). As early as 1863 the Court stated:

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence.

Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863).

[38] *See generally* Dunham, *Due Process and Commercial Law*, 1972 Sup. Ct. Rev. 135; Steinheim, *Address—Summary Prejudgment Creditors' Remedies and Due Process of Law: Continuing Uncertainty After Mitchell v. W.T. Grant Company*, 32 Wash. & Lee L. Rev. 79 (1975); Note, *Changing Concepts of Consumer Due Process in the Supreme Court—The New Conservative Majority Bids Farewell to Fuentes*, 60 Iowa L. Rev. 262, 262-86 (1974).

[39] 339 U.S. 306 (1950).

[40] *Id.* at 314 (citations omitted).

persons whose names and addresses are unknown but that where this information is made available to the trustee, nothing less than notice by mail will suffice.[41]

However, under Mississippi's power of sale foreclosure statute,[42] there is no requirement that the trustee give personal notice of the pending foreclosure sale to the grantor.[43] Neither is there any necessity for a junior lienor to be given notice of the sale regardless of how great an interest he may have.[44] In spite of this, the Mississippi Supreme Court has on at least two occasions set aside foreclosure sales where it found the circumstances to be such that in equity and good conscience personal notice should have been given.[45] These cases, however, are by far the exception rather than the rule.

All that is required of the trustee under section 89-1-55 is that notice of the sale be published for 3 consecutive weeks before the sale with the notice appearing in a newspaper published in the county where the property is situated, or if no newspaper is published in that county, publication must be in a newspaper with "general circulation therein."[46] In addition to the publication requirements, notice must be posted at the courthouse of the county in which the land is located.[47] To effectuate a valid sale, the notice must accurately state the name of the original grantor,[48] any subsequent grantor in possession of the property,[49] the

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[41] *Id.* at 318. *See also* Schroeder v. City of New York, 371 U.S. 208 (1962) (advertisement insufficient in condemnation proceeding); Walker v. City of Hutchinson, 352 U.S. 112 (1956) (advertisement insufficient in condemnation proceeding); Comment, *The Constitutionality of the California Trustee's Sale*, 61 CALIF. L. REV. 1282, 1287-92 (1973). *But see* Covey v. Town of Somers, 351 U.S. 141 (1956) (advertisement sufficient for foreclosure of tax lien except in extraordinary circumstances; Longyear v. Toolan, 209 U.S. 414 (1908) (advertisement sufficient for foreclosure of tax lien against resident).

[42] MISS. CODE ANN. § 89-1-55 (1972).

[43] *See* Rivervalley Co. v. Deposit Guar. Nat'l Bank, 331 F. Supp. 698, 707-08 (N.D. Miss. 1971); Harris v. Bailey Ave. Park, Inc., 202 Miss. 776, 790, 32 So. 2d 689, 693 (1947).

[44] *See* Morgan v. Linham, 227 Miss. 584, 590, 86 So. 2d 473, 475 (1936); Castleman v. Canal Bank & Trust Co., 171 Miss. 291, 300, 156 So. 648 (1934); Tishomingo Sav. Inst. v. Duke, 1 So. 165, 167-68 (Miss. 1887).

[45] Morgan v. Linham, 227 Miss. 584, 590-91, 86 So. 2d 473, 475 (1956) (publication insufficient where person in possession was illiterate and negotiated terms of payment at time of sale), Federal Land Bank v. Robinson, 160 Miss. 546, 558-59, 134 So. 180, 184 (1931) (Bank personally notified grantor of sale to satisfy entire indebtedness, then published and sold for delinquent payments only, thereby leaving deficiency; held to be legal fraud absent actual notice of later intentions).

[46] MISS. CODE ANN. § 89-1-55 (1972). *See also* cases cited in notes 43 & 44 *supra*.

[47] MISS. CODE ANN. § 89-1-55 (1972).

[48] Blakeney v. Smith, 183 Miss. 151, 157, 183 So. 920 (1938).

[49] Wilkinson v. Federal Land Bank, 168 Miss. 645, 150 So. 218, 219-20 (1933), *suggestion of error overruled*, 168 Miss. 645, 151 So. 761 (1934).

date of the impending sale,[50] and a description of the premises to be sold.[51]

Even though *Mullane* involved a judicial proceeding while the exercise of the power of sale does not, the same standard should be applicable since a sale is accorded finality equivalent to a decree of foreclosure in equity. The notice requirements of section 89-1-55 fail to meet this standard. Publication and posting alone do not give a reasonable expectation that the grantor will be informed of the pending action as was required by *Mullane*.[52] In fact, the Mississippi Supreme Court has stated that the primary purpose of the statutory notice is not to inform the grantor but rather to encourage bidders to participate in the sale of the property.[53] Such a statement clearly shows that potential constitutional infirmities in the operation of the statute do exist.

B. Mitchell v. W.T. Grant, Co. *and the Opportunity to be Heard*

A second element of procedural due process—the opportunity to be heard—presents two significant questions: First, at what stage in the proceeding is the hearing necessary? Second, what form of hearing is necessary?

1. Necessity of a Final Deprivation

The genesis of the modern concepts of consumer due process lies in *Sniadach*, where the United States Supreme Court invalidated the Wisconsin wage garnishment procedures[54] which allowed the creditor to freeze a portion of the alleged debtor's wages. Under the Wisconsin statute the creditor was required to file a complaint with the court clerk and then serve process and the complaint on the debtor within 10 days after issuance of the writ of garnishment.[55] The debtor's wages would not be released until he had prevailed on the merits.[56] The court categorized the debtor's wages as a "specialized type of property"[57] and said that garnishment of such property could "as a practical matter drive a wage earning family to the wall."[58] Thus even a temporary deprivation of the

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[50] Johnson v. Federal Land Bank, 176 Miss. 325, 337, 167 So. 776 (1936).

[51] Griffin v. Land, 214 Miss. 557, 565-66, 59 So. 2d 290, 292-93 (1952).

[52] 339 U.S. at 314.

[53] Griffin v. Land, 214 Miss. 557, 567-68, 59 So. 2d 290, 293-94 (1952). *See also* G. OSBORNE, *supra* note 17, § 340, at 733-34.

[54] WIS. STAT. § 267.01 *et seq.* (Supp. 1975-76).

[55] *Id.* § 267.04(1).

[56] *Id.* § 267.07(1).

[57] 395 U.S. at 340.

[58] *Id.* at 341-42.

use of the garnished wages, without notice and an opportunity to be heard before the seizure, violated due process.[59] The Court's characterization of wages as a "specialized type of property" proved to be a constant source of conflict until *Fuentes* was decided.[60]

In *Fuentes* both the Florida[61] and Pennsylvania[62] prejudgment replevin statutes were struck down because they failed to provide the debtor with prior notice and an opportunity to be heard before being temporarily deprived of certain household items.[63] Under both statutes the writ would issue ex parte upon conclusory allegations of the creditor that the debtor was in default and wrongfully holding possession of the creditor's property.[64] These allegations were to be made in a sworn affidavit presented to the clerk, who would then direct the sheriff to seize the property.[65] The debtor could regain possession only after posting a bond double the value of the property seized.[66] The Court noted that there were extraordinary circumstances in which it would be necessary to protect an important governmental or public interest requiring prompt action by an official acting within the limits of a narrowly drawn statute and thus allowing a seizure before a hearing is held.[67] But the Court rejected the argument that the right of a creditor to collect payment of a debt created such a situation.[68]

This decision was later modified substantially, if not reversed in part, by *Mitchell v. W.T. Grant, Co.*,[69] which upheld the constitutionality of Louisiana's sequestration statutes.[70] In *Mitchell*, the Court turned to a balancing test and found that the procedures of the Louisiana statute fairly protected both parties' interests.[71] The Court held that there is no absolute requirement that a hearing be granted before

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[59] *Id.* at 342.

[60] *See generally* Note, *supra* note 12, 46-51; Note, *supra* note 38, 268-77.

[61] FLA. STAT. ANN. §§ 78.01, .07, .08, .10, .13 (Supp. 1972-73). Sections 78.01, .08, .10, and .13 have since been amended. Section 78.07 was repealed. *See id.* §§ 78.01, .08, .10, .13 (Supp. 1975-76).

[62] PA. STAT. ANN. tit. 12, § 1821 (1969), *as amended*, (Supp. 1975-76); PA. R. CIV. P. 1073(b), *as superseded*, PA. R. CIV. P. 1073 (1975).

[63] 407 U.S. at 85, 96.

[64] FLA. STAT. ANN. § 78.01 (Supp. 1972-73), *as amended*, (Supp. 1975-76); PA. STAT. ANN. tit. 12, § 1821 (1969), *as amended*, (Supp. 1975-76); PA. R. CIV. P. 1073(b), *superseded*, PA. R. CIV. P. 1073 (1975).

[65] *See, e.g.*, PA. R. CIV. P. 1073(b), *superseded*, PA. R. CIV. P. 1073 (1975).

[66] FLA. STAT. ANN. § 78.13 (Supp. 1972-73), *as amended*; (Supp. 1975-76); PA. R. CIV. P. 1076(b).

[67] 407 U.S. at 90-91.

[68] *Id.* at 92.

[69] 416 U.S. 600 (1974).

[70] LA. CODE CIV. PRO. ANN. arts. 281-83, 325, 2373, 3501, 3504, 3506-08, 3510, 3571, 3574, 3576 (West 1961).

[71] 416 U.S. at 607.

the debtor is *temporarily* deprived of his property, so long as there is an immediate postseizure determination on the issue of the debtor's default.[72]

In *Mitchell* the Court found a sufficient protection of the debtor's interest in the facts that the writ, although issued ex parte, was issued by a judge and not the court clerk; that there was an opportunity for immediate dissolution of the writ; that the creditor must allege in the affidavit facts showing default rather than conclusions of law; and that the creditor was required to post a bond.[73]

Recently, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,[74] the Supreme Court clarified its holding in *Mitchell*. The case involved a Georgia garnishment statute[75] almost identical to the statutes struck down in *Fuentes*. The Court held that *Mitchell* did not overrule *Fuentes* and was clearly distinguishable from both *Fuentes* and the case before them. Justice White, speaking for the Court, found that

> [t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana Statute. The writ of garnishment is issuable on the affidavit of the creditor or his attorney, and the latter need not have personal knowledge of the facts. The affidavit, like the one filed in this case, need contain only conclusory allegations. The writ is issuable, as this one was, by the court clerk without participation by a judge. Upon service of the writ, the debtor is deprived of the use of the property in the hands of the garnishee . . . . There is no provision for early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.[76]

Under Mississippi law there is no period of redemption, and there is a final deprivation upon execution of the sale.[77] Thus, for a hearing to be timely, it would have to be held before the sale was executed. At the present time no such hearing is required, and the only method by which the grantor can resolve a conflict over the question of his default is by a suit to enjoin the sale.[78]

2. The Adequacy of the Hearing

Procedural due process does not dictate that there be a particular

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[72] *Id.* at 605-07.

[73] *Id.*

[74] 419 U.S. 601 (1975), *noted in* 46 MISS. L.J. 1104 (1975).

[75] GA. CODE ANN. §§ 46-101 to -108 (1956).

[76] 419 U.S. at 607.

[77] Dean v. Simpson, 235 Miss. 162, 170, 108 So. 2d 546, 549 (1959).

[78] *See, e.g.*, Tonkel v. Shields, 125 Miss. 461, 475, 87 So. 646, 648 (1921); Hembree v. Johnson, 119 Miss. 204, 209-10, 80 So. 554, 556 (1918).

type of hearing uniformly available in all cases. Indeed the United States Supreme Court has recognized that the form of the hearing may vary depending on the nature of the interests involved.[79] Viewed in light of the fact that in most mortgage foreclosures the grantor stands to lose his home or place of business, the availability of an injunction to stop the sale may be insufficient to satisfy the requirements of the fourteenth amendment.

In two recent cases, *Turner v. Blackburn*[80] and *Northrip v. Federal National Mortgage Association*,[81] two federal district courts have invalidated foreclosure sales[82] for failing to provide necessary due process protections. Both district courts rejected contentions that a suit to enjoin the sale provided an adequate hearing on the question of the grantor's default.[83] They found that the securing of an injunction placed the burden of proving cause for the issuance of the order on the grantor[84] and also required the posting of a substantial bond,[85] both requirements presenting constitutional deficiencies.

The Mississippi procedure suffers from the same infirmities. In addition to the requirement that the grantor assume the burden of proving that the injunction should issue,[86] the Mississippi statute requires that the grantor must post bond in an amount double the value of the debt.[87] A similar bonding requirement was invalidated in *Fuentes*.[88]

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[79] *See, e.g.*, Mitchell v. W.T. Grant Co., 416 U.S. 600, 610 (1974); Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950).

[80] 389 F. Supp. 1250 (W.D.N.C. 1975).

[81] 372 F. Supp. 594 (E.D. Mich. 1974).

[82] The sale in Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), was held pursuant to N.C. GEN. STAT. §§ 45-21.17, .20, .26, .27, .29, .29A, .33 (1966 & Supp. 1974), while the sale in Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594 (E.D. Mich. 1974), was in accordance with MICH. COMP. LAWS ANN. §§ 600.3201-.3280 (1967). In neither case were the statutes held unconstitutional per se, because the grantor could have waived his rights to due process. 389 F. Supp. at 1260; 372 F. Supp. at 598.

[83] Turner v. Blackburn, 389 F. Supp. 1250, 1259 (W.D.N.C. 1975); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594, 598-600 (E.D. Mich. 1974); *see* Gardner v. Tri-State Dev. Co., 382 F. Supp. 377, 380-81 (E.D. Mich.), *appeal docketed*, No. 74-1500, 6th Cir. May 1, 1974. *But see* Comment, *supra* note 41, at 1298-1306.

[84] Turner v. Blackburn, 389 F. Supp. 1250, 1259 (W.D.N.C. 1975); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594, 598-600 (E.D. Mich.), *appeal docketed*, No. 74-1501, 6th Cir. May 1, 1974; *see* Gardner v. Tri-State Dev. Co., 382 F. Supp. 377, 380 (E.D. Mich.), *appeal docketed*, No. 74-1500, 6th Cir. May 1, 1974.

[85] Turner v. Blackburn, 389 F. Supp. 1250, 1259 (W.D.N.C. 1975).

[86] MISS. CODE. ANN. § 11-13-1 (1972). *See also* Giles v. Hengen, 206 So. 2d 626, 627 (Miss. 1968). If the grantor tenders payment of the amount due and all accrued costs of the sale, the injunction must issue. *See* Hembree v. Johnson, 119 Miss. 204, 209-10, 80 So. 554, 556 (1918).

[87] MISS. CODE ANN. § 11-13-5 (1972).

[88] 407 U.S. at 84-85.

C. *The Requirements of Valid Waiver*

Since any or all of a debtor's due process rights are subject to valid waiver, the question now becomes whether or not the inclusion of the power of sale in the deed of trust satisfactorily waives the debtor's right to personal notice and prior hearing. To answer this question, it is necessary to focus on the economic and social status of the grantor.

In *D.H. Overmeyer Co. v. Frick Co.*,[89] the United States Supreme Court upheld an Ohio statute[90] regulating cognovit note provisions whereby a debtor could consent to a judgment entered against him upon his default without notice or hearing. The Court noted that these rights had effectively been waived by the debtor. The Court pointed out that both the debtor and the creditor were corporations, and that they had actively bargained for the provision in the negotiations preceding the transaction of business.[91]

On the same day in which the Court rendered its opinion in *Overmeyer*, it decided *Swarb v. Lennox*,[92] where it held Pennsylvania's cognovit note provisions[93] to be unconstitutional as applied to a particular class of consumers. The Court found that the existence of a disparity in the bargaining power between debtor and creditor and the existence of a standard form contract prevented a valid waiver.[94] This distinction had been clearly expressed in dicta of *Overmeyer*.[95]

The decision in *Swarb* was strengthened by the Court in *Fuentes*. In *Fuentes* the creditors attempted to argue that a provision in the conditional sales contract expressly giving the creditor the right to possess the goods amounted to a waiver. The Court rejected this contention and stated that a contractual waiver must be " 'voluntary, [*sic*] intelligently, and knowingly' made."[96] The Court distinguished *Overmeyer* by holding there was no proof that the provision concerning the right to repossess had ever been brought to the attention of the debtor; to meet the minimum constitutional requirement it would be necessary for the waiver to be clear.[97]

Some pre-*Fuentes* cases had found the power of sale to constitute a waiver of due process,[98] but the *Turner* and *Northrip* decisions rejected

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[89] 405 U.S. 174 (1972).

[90] Ohio Rev. Code Ann. § 2323.13 (Supp. 1974).

[91] 405 U.S. at 185-88.

[92] 405 U.S. 191 (1972).

[93] Pa. R. Civ. P. 2950-76.

[94] 405 U.S. at 201-02.

[95] *Id.* at 188.

[96] 407 U.S. at 94-95.

[97] *Id.* at 95.

[98] *See* Young v. Ridley, 309 F. Supp. 1308, 1313 (D.D.C. 1970); Huggins v. Dement,

such an argument.[99] In *Northrip* the power of sale provision merely provided that the mortgagee could foreclose pursuant to the statute upon the debtor's default.[100] Since Michigan law allowed both judicial foreclosure and foreclosure by power of sale, and since the particular mode of foreclosure was not prescribed by the terms of the deed, the court found that the power did not operate as a waiver because it was unclear.[101] In *Turner* the court noted that the provisions alluding to the power were in fine print, the grantor's attention had not been called to these provisions, and the grantor was unaware of their legal significance.[102] These infirmities, coupled with the failure of the provision to state what rights were waived, caused the power of sale clause to be inadequate as a waiver of due process rights.[103]

This is not to say that a power of sale provision in a deed of trust can never effectuate a valid waiver. If it can be shown that there was no overreaching; that the existence and effect of the power were brought to the attention of the grantor; and that the grantor understood the possible consequences; then the power should operate as a waiver of the grantor's rights to personal notice and prior hearing.

III. State Action

Despite the constitutional inadequacies which may exist—insufficient notice and failure to provide an effective hearing—the Mississippi power of sale foreclosure proceedings should withstand due process attack. Before the demands of the fourteenth amendment must be met, it is necessary for the deprivation to result from "state action."[104] The state is not so significantly involved in the foreclosure

13 N.C. App. 673, 187 S.E.2d 412, 415-16 (1973); *cf.* Gardner v. Tri-State Dev. Co., 382 F. Supp. 377, 380-81 (E.D. Mich.), *appeal docketed*, No. 74-1500, 6th Cir. May 1, 1974; Law v. United States Dep't of Agriculture, 366 F. Supp. 1233, 1280 (N.D. Ga. 1973).

[99] Turner v. Blackburn, 389 F. Supp. 1250, 1260-61 (W.D.N.C. 1975); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594, 599 (E.D. Mich.), *appeal docketed*, No. 74-1501, 6th Cir. May 1, 1974.

[100] 372 F. Supp. at 599.

[101] *Id.* at 599-600.

[102] 389 F. Supp. at 1260-61.

[103] *Id.* at 1261.

[104] "[N]or shall any State deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV, § 1. In addition to the constitutional claim, the debtor may have a statutory right of action under 42 U.S.C. § 1983 (1970), which protects persons from a deprivation of rights "under color of state law." 28 U.S.C. § 1343(3) (1970), removes the $10,000 jurisdictional amount requirement of 28 U.S.C. § 1331 (1970), for actions under section 1983.

"State action" is the Court's sobriquet developed for the phrase "nor shall any State." It is interpreted as having the same meaning as the phrase "under color of state law" found

process as to cause the applicable constitutional principles to be invoked. Deprivations resulting from the deeds of a person or persons acting in their individual capacity while dealing with another person or persons are not protected by the fourteenth amendment;[105] it is this form of deprivation which flows from a foreclosure under the power of sale.

A. Early Power of Sale Cases

The first due process challenge to a power of sale foreclosure arose in North Dakota in 1886.[106] Since that time the United States Supreme Court has addressed the issue on only one occasion. In *Scott v. Paisley*[107] the Court was called upon to rule on the constitutionality of a sale under a Georgia statute[108] governing the extrajudicial sale of property covered by a "security deed." The only notice given was by advertisement. The Court stated that

> the right of one who purchases property subject to a security deed, with a statutory power of sale which must be read into the deed, is no greater than that of one who purchases property subject to a mortgage or trust deed, with a contractual power of sale.[109]

The Court went on to hold that since the Georgia procedure was so closely analogous to a contractual power of sale there was no violation of due process, and unless otherwise required by the deed, no personal notice was necessary.[110]

Although the Court did not openly state that there was an absence of "state action," such an interpretation is necessitated by the Court's reference to the power as being a contractual undertaking. Shortly after *Scott*, the United States Court of Appeals for the Ninth Circuit reached

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in 42 U.S.C. § 1983 (1970) and its criminal counterpart 18 U.S.C. § 242 (1970). *See* United States v. Price, 385 U.S. 787, 794 n.7 (1966).

[105] The Civil Rights Cases, 109 U.S. 3, 11-12 (1883).

> Individual invasion of individual rights is not the subject-matter of the Amendment. . . . Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.

Id. at 11.

[106] Robinson v. McKinney, 4 N.D. 290, 29 N.W. 658, 658-59 (1886).

[107] 271 U.S. 632 (1926).

[108] Ga. Code § 6037 (1910).

[109] 271 U.S. at 635.

[110] *Id.* at 635-36.

similar results where the constitutionality of California trustees' sales was questioned.[111] Prior to the recent flood of debtor due process cases[112] a number of fourteenth amendment attacks had been made in state courts. Relying on the same rationale as *Scott* these courts had unanimously rejected the constitutional claims and refused to invalidate the sales.[113]

B. Modern Developments in State Action

1. Direct State Action

Where a deprivation of personal or property rights results from the effects of a court decree or the activity of a government office or official, the state is directly involved and there is no serious "state action" issue.[114] In summary foreclosure proceedings, however, the right to sell the property and thereby deprive the grantor of his property emanates from the terms of the security instrument, rather than the statute.[115] Attempts to establish direct state involvement resulting from the recordation of the purchaser's deed, or transfer of title, or some other ministerial act of a state employee, have generally failed.[116] The soundness of these decisions is unquestionable when viewed in light of the fact that such acts are services performed for the public at large and are necessary for the maintenance of order and certainty within the American legal system.

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[111] Curti v. Pacific Mortgage Guar. Co., 87 F.2d 42, 43 (9th Cir. 1936); Davidow v. Lachman Bros. Inv. Co., 76 F.2d 186, 188 (9th Cir. 1935).

[112] See notes 3 through 11 and accompanying text *supra*.

[113] *See, e.g.*, Lancaster Sec. Inv. Corp. v. Kessler, 159 Cal. App. 2d 649, 324 P.2d 634, 637 (2d Dist. Ct. App. 1958), *appeal dismissed*, 358 U.S. 306 (1959); Davidow v. Corporation of America, 16 Cal. App. 2d 6, 60 P.2d 132, 135 (1st Dist. Ct. App. 1936); Ruff v. Lee, 230 Ga. 426, 197 S.E.2d 376, 377 (1972); Roos v. Belcher, 16 Idaho 473, 321 P.2d 210, 213 (1958); Huggins v. Dement, 13 N.C. App. 673, 187 S.E.2d 412, 414 (1972).

[114] Such was the case in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (writ of sequestration issued by judge and property seized by sheriff); Fuentes v. Shevin, 407 U.S. 67 (1972) (writ of replevin issued by court clerk and property seized by sheriff); Goldberg v. Kelly, 397 U.S. 254 (1970) (state welfare benefits were terminated); and Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (writ of garnishment issued by court clerk).

[115] See notes 23 through 25 and accompanying text *supra*.

[116] *E.g.*, Barrera v. Security Bldg. & Inv. Corp., 519 F.2d 1166, 1170 (5th Cir. 1975); Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1383 (N.D. Ga. 1974); Northrip v. Federal Nat'l Mortgage Ass'n, 372 F. Supp. 594, 597 (E.D. Mich.), *appeal docketed*, No. 74-1501, 6th Cir. May 1, 1974. *But see* Turner v. Blackburn, 389 F. Supp. 1250, 1255-56 (W.D.N.C. 1975) (where clerk has other duties, aside from recording the deeds, requiring him to take some affirmative action, there is direct state action); Gardner v. Tri-State Dev. Co., 382 F. Supp. 377, 379-80 (E.D. Mich.), *appeal docketed*, No. 74-1500, 6th Cir. May 1, 1974.

2. Theories of Indirect State Action

It is now invariably accepted that for "state action" to be present it is not necessary that there be direct government involvement.[117] The courts will find indirect state action, however, only after having carefully weighed the interests of each party in light of the particular right to be protected.[118] Since 1926, when *Scott* was decided, the definition of the term "state action" has been expanded to incorporate an increased number of formerly private activities.[119] When attacking extrajudicial foreclosure or some other self-help remedy employed by creditors, however, debtors have met with little success in establishing the presence of the requisite degree of state involvement necessary to activate the Constitution's due process mechanisms.[120] Generally, debtors have advanced three theories in support of their position.[121]

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[117] *See generally* Burke & Reber, *State Action, Congressional Power and Creditor's Rights: An Essay on the Fourteenth Amendment*, 47 S. CAL. L. REV. 1003, 1009-10 (1973); Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656, 656-58 (1974); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840, 840-42 (1974).

[118] *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961). In *Burton*, the Court noted that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement by the State in private conduct be attributed its true significance." *Id.* at 722.

[119] Shelley v. Kraemer, 334 U.S. 1 (1948), is probably the broadest application of indirect state action to date. In *Shelley*, the Court held that discriminatory restrictive covenants were not a violation of the fourteenth amendment because they were private acts, but that there was state action when the courts tried to enforce the agreement. *Id.* at 19. *See generally* Burke & Reber, *supra* note 117, at 1009-12; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity, supra* note 117; Note, *State Action and the Burger Court, supra* note 117, at 844-46.

[120] *See, e.g.*, Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351-58 (1974), *noted in* 16 B.C. IND. & COM. L. REV. 867 (1975) (utility termination); Davis v. Richmond, 512 F.2d 201, 203-05 (1st Cir. 1975) (innkeeper's lien); Bryant v. Jefferson Fed. Sav. & Loan Ass'n, 509 F.2d 511, 514 (D.C. Cir. 1974) (power of sale foreclosure); Phillips v. Money, 503 F.2d 990, 992-94 (7th Cir. 1974), *cert. denied*, 420 U.S. 934 (1975) (garageman's lien); Fletcher v. Rhode Island Hosp. Trust Nat'l Bank, 496 F.2d 927, 929-33 (1st Cir.), *cert. denied*, 419 U.S. 1001 (1974) (bank setoff and banker's lien); Bond v. Dentzer, 494 F.2d 302, 307-11 (2d Cir. 1973) (wage assignments); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324, 331-36 (9th Cir. 1973), *cert. denied*, 416 U.S. 1006 (1974) (UCC self-help repossession).

Debtors have had very little success in their attacks on UCC §§ 9-503 and 9-504 which are closely analogous to power-of-sale regulatory statutes. *See* King v. South Jersey Nat'l Bank, 66 N.J. 161, 330 A.2d 1, 5 & n.6 (1974).

The remedy against which debtors have been most successful are landlord's and innkeeper's liens. *See* note 133 *infra*.

[121] *See* note 120 *supra*. *See also* Brief for Petitioner at 16-33, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Comment, *Public Utilities—State Action and Informal Due Process After Jackson*, 53 N.C.L. REV. 817 (1975); Comment, *Prejudgment Replevin*

First, the debtors argue that various statutory schemes encourage lenders to follow procedures which violate due process. This, they contend, is state action under the holding of *Reitman v. Mulkey*.[122] *Reitman* found state action where a California constitutional amendment allowed persons to discriminate against minorities in the sale or lease of property.[123] The Court enjoined such conduct and stated that the amendment created a right to discriminate which had not been present before its enactment,[124] thereby encouraging the exercise of racial discrimination.[125]

A second theory is that statutes or acts of the state may establish a scheme of pervasive statutory regulation[126] or government subsidization[127] of private activity which causes the state to become so entangled in that conduct as to make it a joint participant. Primary support for the entanglement argument is drawn from *Burton v. Wilmington Parking Authority*[128] where the Court held that the leasing of space in a state-owned facility to a private restaurant which was open to the public amounted to state action so as to allow application of the equal protection clause.[129]

Finally, it has been contended that the seizure or sale of property by creditors in the exercise of any form of self-help remedy is a usurpation of a traditional government function. In *Marsh v. Alabama*,[130] the United States Supreme Court ruled that the ordinances of a privately owned, company-operated town had the effect of state law. The Court reasoned that even though the town was privately owned, it functioned as, and took the place of, a state-created municipal corporation.[131] Additional support for this position is drawn from *Hall v. Garson*,[132] in which the United States Court of Appeals for the Fifth Circuit found that the Texas landlord lien laws delegated to the landlord the power of lien enforcement which had traditionally been a function of the sheriff.[133]

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and Self-Help Repossession—Creditor Remedies of the Past: A Constitutional Plan of Assault, 17 ST. LOUIS L.J. 127, 142-47 (1972).

[122] 387 U.S. 369 (1967).

[123] *Id.* at 374-76.

[124] *Id.* at 381.

[125] *Id.*

[126] *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972). *See also* Robinson v. Florida, 378 U.S. 153 (1964).

[127] Burton v. Wilmington Parking Authority, 365 U.S. 715, 722-25 (1961).

[128] 365 U.S. 715 (1961).

[129] *Id.* at 722-25.

[130] 326 U.S. 501 (1946); *accord*, Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 318-19 (1968).

[131] 326 U.S. at 506-08.

[132] 430 F.2d 430 (5th Cir. 1970).

[133] *Id.* at 439. Several courts have followed the reasoning of *Hall* to invalidate similar

In light of recent developments, however, the weight of these cases is suspect. The United States Supreme Court has noted that when searching for "state action" it is necessary to interpret the fourteenth amendment in its historical perspective.[134] Today, commentators[135] and courts[136] alike have begun to take the position that less state involvement is necessary to invoke the protections of the fourteenth amendment against racial discrimination than other constitutional rights. Since such discrimination is not present in nonjudicial foreclosure cases, a greater degree of state action should be required.

Another element which must be considered is the present composition of the Supreme Court. The Burger Court appears to believe that the Court has driven as deep into private conduct as the fourteenth amendment can penetrate without obliterating the line between state and private action.[137] A survey of recent key decisions shows that the conservative majority of the Burger Court is beginning to retreat from the more liberal positions taken by the Court in the past.[138] One of the most significant of these decisions was *Moose Lodge No. 107 v. Irvis*,[139] where both the entanglement and encouragement arguments were dealt a severe blow. Despite extensive regulation and licensing provisions governing facilities which serve alcoholic beverages, the Court refused to apply the equal protection clause to a private club which refused to serve blacks.[140] The majority found no proof that the regulations allowing such clubs to serve drinks would increase the number of private

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statutes. *See, e.g.*, Barber v. Rader, 350 F. Supp. 183, 188-89 (S.D. Fla. 1972); Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 20, 300 N.E.2d 710, 714, 347 N.Y.S.2d 170, 176 (1973).

[134] District of Columbia v. Carter, 409 U.S. 418, 425 (1973).

[135] *See* Burke & Reber, *supra* note 117, at 1040-41; Note, *State Action: Theories Applying Constitutional Restrictions to Private Activity, supra* note 117, at 656-58; Note, *State Action and the Burger Court, supra* note 117, at 858-62.

[136] *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 374 (1974) (Marshall, J., dissenting); Scott v. Eversole Mortuary, Civil No. 73-2765 (9th Cir. July 8, 1975); James v. Pinnix, 495 F.2d 206, 208-09 (5th Cir. 1974); Bond v. Dentzer, 494 F.2d 302, 312 n.7 (2d Cir. 1974).

[137] *See* Burke & Reber, *supra* note 117, at 1018; Note, *State Action: Theories Applying Constitutional Restrictions to Private Activity, supra* note 117, at 656-58; Note, *State Action and the Burger Court, supra* note 117, at 863-64.

[138] *Compare* Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Reitman v. Mulkey, 387 U.S. 369 (1967); Shelly v. Kraemer, 334 U.S. 1 (1947), *with* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Evans v. Abney, 396 U.S. 495 (1970). *See generally* Note, *State Action and the Burger Court, supra* note 117, at 847-54. *See also* Comment, *Public Utilities—State Action and Informal Due Process After Jackson, supra* note 121, at 825.

[139] 407 U.S. 163 (1972).

[140] *Id.* at 176-77.

clubs in Pennsylvania.[141] The Court also concluded that the activity of the state was too far removed from the objectionable conduct to have that conduct imputed to it.[142]

In *Jackson v. Metropolitan Edison Co.*[143] the Burger Court delivered what is probably the death blow to debtor due process assaults on judicial foreclosure and other state-regulated, contractually created, private creditor remedies. *Metropolitan Edison* was a due process challenge to a utility termination by a privately owned electric company.[144] The company was subject to extensive statutory and administrative regulation[145] and enjoyed a partial monopoly status in the distribution of electric power in Pennsylvania.[146] The Court, speaking through Justice Rehnquist, rejected contentions of government entanglement in Metropolitan's activities, stating that the mere fact that a business is regulated, even if that regulation is "extensive and detailed," does not constitute "state action."[147] Further, the Court found that since providing public utility services has not been "traditionally associated with sovereignty", there was no assumption by Metropolitan of a government function.[148] Finally, the Court disposed of the argument that the regulations authorized and encouraged the termination without prior notice or opportunity for hearing by stating that Metropolitan had merely "exercise[d] . . . the choice allowed by state law where the initiative comes from it [Metropolitan] and not from the State."[149]

Creditors' remedies in general, and power of sale foreclosure in particular, are not regulated as extensively as public utilities. Thus, *Metropolitan Edison* is a clear expression of the Burger Court's desire to hold the line against any further expansion of the fourteenth amendment into private conduct.[150]

C. *Power of Sale and State Action: The Current Trends*

In recent years the constitutionality of power of sale foreclosure has

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[141] *Id.* at 173.

[142] *Id.* at 177.

[143] 419 U.S. 345 (1974), *noted in* 16 B.C. IND. & COM. L. REV. 867 (1975).

[144] *Id.* at 346-48.

[145] The provisions involved in the case were PA. STAT. ANN. tit. 66, §§ 1102, 1121-23, 1148, 1171 (1959 & Supp. 1974-75), and PA. P. U. C. TARIFF REG. §§ II, VIII, *quoted and cited in* 419 U.S. at 455 n.13, 456 nn.14 & 15.

[146] 419 U.S. at 351 & n.8.

[147] *Id.* at 350.

[148] *Id.* at 353.

[149] *Id.* at 357.

[150] One commentator has observed that *Jackson* reflects a return to the balancing approach applied by the Court in Marsh v. Alabama, 326 U.S. 501 (1946). Comment, *Public Utilities—State Action and Informal Due Process after Jackson, supra* note 121.

become a popular subject among the commentators. Some have concluded that significant state involvement in the procedure is lacking,[151] but this view has many opponents.[152]

After *Sniadach* the "state action" question as regards power of sale foreclosure was first addressed in *Logan v. Short*.[153] The plaintiffs had not received a hearing before the sale and sought to have the sale set aside.[154] The *Logan* court did not reach a decision on the basis of the abstention doctrine.[155] However, the court's opinion clearly expressed the view that state action was absent.[156] Less than 2 years later, *Northrip v. Federal National Mortgage Association*[157] struck down a Michigan extrajudicial foreclosure sale. The district court rejected the contention that the mortgagee assumed a traditional government function on the grounds that the contract created the right to sell, noting that judicial recognition of foreclosure by power of sale as a private action, was of early origin in Michigan.[158] The entanglement theory was also rejected because no benefit flowed to the state and the statutory scheme was "not so pervasive as to constitute state action."[159] However, the court did find state action under the encouragement theory.[160] This was supported by the court's comparison of the number of judicial foreclosures and the number of foreclosures by advertisement.[161] The only federal

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[151] *See* Burke & Reber, *supra* note 117, at 31-33; Comment, *Power of Sale Foreclosure After Fuentes, supra* note 12, at 218-19.

[152] Comment, *supra* note 41, at 1285-87; Comment, *California's Nonjudicial Foreclosure Notice Requirements and "The Sniadach Progeny": An Evaluation*, 9 CALIF. W.L. REV. 290, 302 (1973); Comment, *Mortgages—Does Foreclosure Under Power of Sale Violate Due Process Right?*, 4 CUMBER.-SAM. L. REV. 507, 518-19 (1974); Comment, *Due Process Evolution—Fuentes and the Deed of Trust*, 26 SW. L.J. 876, 883-87 (1972).

[153] 342 F. Supp. 1349 (E.D. Mo. 1972).

[154] *Id.* at 1350.

[155] *Id.* at 1351. Abstention is a self-imposed restraint exercised by a federal court wherein it will "decline to proceed" even though it has jurisdiction under the Constitution and statutes. There are several factual circumstances which cause a court to invoke abstention which have led a leading writer to conclude that in reality there is more than one abstention doctrine. *See* C. WRIGHT, LAW OF FEDERAL COURTS § 52, at 196 (2d ed. 1970).

[156] 342 F. Supp. at 1351.

> The Missouri statutes of which plaintiffs complain simply *sanction* the procedure of foreclosure without suit, but do not require it. . . . As we view the Missouri statutes in their totality, they are basically intended to be remedial, adopted for the protection of the debtor by prescribing a minimum period for which notice of sale must be given as well as the content of the notice and manner in which it must be given.

Id.

[157] 372 F. Supp. 594 (E.D. Mich.), *appeal docketed*, No. 74-1501, 6th Cir. May 1, 1974.

[158] 372 F. Supp. at 579 & n.5.

[159] *Id.* See text accompanying notes 126 through 129 *supra*.

[160] 372 F. Supp. at 597. See text accompanying notes 122 through 125 *supra*.

[161] 372 F. Supp. at 597. The court stated that only 52 out of over 8,000 foreclosures

district court case using *Northrip* as precedent for establishing "state action" in a power of sale foreclosure proceeding originated in the same district as *Northrip* but reached a different result on the merits of the case.[162]

The most recent case invalidating a summary foreclosure sale is *Turner v. Blackburn*.[163] However, in *Turner* the court did not address the problem of indirect state action but rather found direct state action as a result of extensive supervisory powers over the foreclosure sale granted to the county clerk by statute.[164]

In *Bryant v. Jefferson Federal Savings & Loan Association*[165] the United States Court of Appeals for the District of Columbia Circuit upheld against a due process challenge[166] a foreclosure sale nearly identical to the one in *Northrip*. Relying on the UCC self-help repossession cases,[167] the District of Columbia Circuit rejected the entanglement[168] and traditional government function[169] attacks for the same reasons as did *Northrip*. But the court went further and rejected the encouragement argument propounded in *Northrip* on the ground that the statutes governing the power of sale did not encourage the exercise of extrajudicial foreclosure but served as a restriction on the trustee's conduct.[170] The court pointed out that such statutes were remedial legislation aimed at preventing abuse of the power by creditors.[171] Relying on the same rationale, a federal district court in Georgia reached a similar result.[172]

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had been by judicial decree.

[162] Garner v. Tri-State Dev. Co., 382 F. Supp. 377, 379 (E.D. Mich.), *appeal docketed*, No. 74-1500, 6th Cir. May 1, 1974. The transaction in *Garner* involved two corporate enterprises operated by knowledgeable businessmen. The court was of the opinion that no decision on the validity of the sale could be made without first having a factual hearing on the issue of waiver with a finding that under such circumstances a power of sale provision in a mortgage may be sufficient to show a knowing waiver. 382 F. Supp. at 381.

[163] 389 F. Supp. 1250 (W.D.N.C. 1975).

[164] *Id.* at 1254-58.

[165] 509 F.2d 511 (D.C. Cir. 1974).

[166] This challenge was under the fifth amendment. The court noted that the restrictions of both the fifth and fourteenth amendments are aimed at governmental conduct and therefore the same degree of involvement is necessary. *Id.* at 513 n.4.

[167] *Id.* at 514; *see* Gibbs v. Titleman, 502 F.2d 1107 (3d Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Shirley v. State Nat'l Bank, 493 F.2d 739 (2d Cir. 1974); Adams v. Southern Cal. First Nat'l Bank, 492 F.2d 324 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

[168] 509 F.2d at 514-15.

[169] *Id.* at 514.

[170] *Id.*

[171] *Id.*

[172] Global Indus., Inc. v. Harris, 376 F. Supp. 1379, 1383 (N.D. Ga. 1974).

Recently, the United States Court of Appeals for the Fifth Circuit followed *Bryant*. In *Barrera v. Security Building & Investment Corp.*,[173] owners of a residence which was sold through an extrajudicial foreclosure challenged the constitutionality of the Texas statutory scheme[174] for selling land under a deed of trust. The grantors under the deed were migrant farm workers who executed the loan for the purpose of building a home. Both the husband and the wife had only a limited understanding of the American language. The investment corporation had allegedly promised them that the note which they would sign provided for "flexible financing arrangements"[175] so as to permit them to skip payments during months in which there was no work and also promised that the house would be built to their specifications. The Barreras were dissatisfied with the house and upon the advice of counsel withheld all further payments. The corporation then foreclosed the deed in accordance with the Texas procedure. Texas law required notice to be posted at three places in the county where the secured land was located, one of which was required to be the county courthouse. The district court dismissed the case for want of state action.

Judge Wisdom's opinion, affirming the lower court, noted that *Northrip* and *Turner* were to the contrary but relied on *Bryant*, several lower federal court cases in Texas, and a Texas civil appeals court decision.[176] The opinion stated that the procedure did not aid, compel, or encourage the exercise of the power of sale, but found, as did the District of Columbia Circuit in *Bryant*, that it operated, although ineffectually, as a restraint upon the trustee and the grantor.[177] The appellant's argument that the regulatory scheme governing mortgage transactions was so pervasive as to cause the state to be entangled in the process was also rejected by the court.[178] Relying on *Moose Lodge No. 107* and *Metropolitan Edison* the court stated that

> [t]he mere fact that the state has undertaken regulation of an activity does not mean that the activity so regulated, but not forbidden, is to be imputed to the state. As Judge Friendly has observed, "the state's choice to regulate to some degree, a choice it was free to make or not, does not compel it to exercise its powers to the utmost."[179]

It is the nature of the regulation, not the degree of regulation, which is

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[173] 519 F.2d 1166 (5th Cir. 1975).
[174] TEX. REV. CIV. STAT. art. 3810 (Vernon 1966).
[175] 519 F.2d at 1168.
[176] *Id.* at 1169-70.
[177] *Id.* at 1171.
[178] *Id.*
[179] *Id.*

relevant. Since there was "no significant link between the state and the actions which [were] the subject of the Barreras' complaint," under *Metropolitan Edison* there was no state action.[180]

The Barreras' final attempt at establishing state action was under the traditional public function argument.[181] Just as did the courts in *Northrip* and *Bryant*, the Fifth Circuit easily disposed of this argument by noting that in Texas, as in most jurisdictions, the power of sale has long been recognized as a private remedy and is in no way associated with the exercise of some sovereign power.[182]

The Mississippi statutory procedure governing the sale of property under a power of sale is not identical to the one upheld in *Bryant* or *Barrera* but is sufficiently analogous to command the same result.[183] As has been shown, the power to sell the secured property upon the grantor's default has traditionally been recognized as vesting in the trustee, not the sovereign.[184] Also, the mere enactment by the Mississippi Legislature of provisions setting a guideline for purely private activity, such as the contractual relations between a lender and a borrower, does not entangle the state in the private affairs of its citizens. As the court noted in *Bryant*: "Statutes and laws regulate many forms of purely private activity . . . and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."[185] Likewise there is no proof that the statute has encouraged the use of power of sale foreclosure without due process guarantees, since, absent the statute, the power could still exist with only the terms of the deed of trust to control its exercise.[186] In addition to this, the Mississippi Supreme Court has repeatedly acknowledged the restrictive nature of the statute by striking down sales for seemingly insignificant variations from the dictates of section 89-1-55.[187]

Conclusion

The Mississippi power of sale foreclosure procedures are probably beyond constitutional reach. However, these procedures, in several respects, unjustifiably violate the spirit of the fourteenth amendment.

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[180] *Id.* at 1171-72.

[181] *Id.* See notes 130 through 133 and accompanying text *supra*.

[182] 519 F.2d at 1172.

[183] *Compare* Miss. Code Ann. § 89-1-55 (1972), *with* D.C. Code Encycl. Ann. § 45-615(b) (1968), *and* Tex. Rev. Civ. Stat. art. 3810 (Vernon 1966).

[184] See note 22 and accompanying text *supra*.

[185] 509 F.2d at 514, *quoting* Adams v. Southern Cal. Nat'l Bank, 492 F.2d 324, 330-31 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

[186] Hyde v. Warren, 46 Miss. 13, 28 (1871). See note 21 and accompanying text *supra*.

[187] See notes 25, 26, 31 through 33, 39 through 42 and accompanying text *supra*.

The Mississippi Legislature must ask itself whether in good conscience it can continue to allow citizens to deal with each other in a manner which would be offensive to the fundamental law of the land if one of the participants were the state.

It is time that the legislature recognize the need for a more effective form of notice to be given to all interested parties. This could be accomplished by amending section 89-1-55 to require that notice of the sale be mailed to the grantor in possession of the premises. It should also provide for notice to any other parties holding an interest in the property who have requested receipt of such notice and have recorded their requests in the margin of the record. Such provisions would give not only the grantor, but any interested party, a meaningful opportunity to protect their interests. Similar provisions are presently in effect in a number of states.[188] Any additional time and costs resulting from these changes would be nominal, and the changes would provide compliance with at least the minimum due process standards.[189]

Fundamental fairness and a moral sense of justice necessitate these changes. Indeed, the legal profession has already begun to recognize the need for such changes and has urged legislative bodies across the country to take these long needed corrective measures.[190] Mississippi should assume a position of leadership and contribute its best efforts to the task ahead.

Paul J. Delcambre, Jr.

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[188] *E.g.*, ARIZ. REV. STAT. ANN. §§ 33-807 to -810 (1956); IDAHO CODE §§ 45-1505 to -1506 (Supp. 1974); MO. ANN. STAT. §§ 443.320-.325 (Vernon Supp. 1975); VA. CODE ANN. §§ 55-59 (1950).

[189] See note 45 and accompanying text *supra*.

[190] *See* Nelson, *Deed of Trust Foreclosure Under Powers of Sale*, 28 MO. B.J. 428, 436-37 (1972); Pedowitz, *Current Developments in Summary Foreclosure*, 9 REAL PROP. PROBATE & TRUST J. 421, 432 (1974).

I. Right to Assistance by Counsel

A. *Scope of the Constitutional Right*

A person accused of a crime has a constitutional right to be assisted by counsel in his defense. This right is guaranteed by both the Mississippi Constitution[4] and the federal constitution[5] as applied to the states by the due process clause of the fourteenth amendment.[6] This section discusses the scope of the right, including the right to be represented by counsel of one's choice, the right of an indigent to court-appointed counsel during the "critical stages" of prosecution, the right to have counsel available during custodial interrogation, minimum rights of discovery required by the due process clause, and rights to investigatory services provided by the state.

1. Right to Choose and Retain Counsel

The right of the accused to have a reasonable opportunity to employ and consult with counsel of his choice is a direct corollary of the Mississippi and federal guarantees to assistance by counsel.[7] This right is not without statutory limitations; an accused may not employ a judge,[8] the attorney general,[9] a district attorney of any district,[10] a county attorney of any county within the circuit court district where trial is to be held,[11] a partner of the district attorney of the district or the county attorney of the county where trial is to be held,[12] or a partner of the justice of the

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[4] Miss. Const. art. 3, § 26, provides: "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both . . . ."

[5] U.S. Const. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

[6] U.S. Const. amend. XIV, § 1; *see* Chandler v. Fretag, 348 U.S. 3, 9-10 (1954).

[7] Chandler v. Fretag, 348 U.S. 3, 9-10 (1954); Watson v. State, 196 So. 2d 893, 895 (Miss. 1967).

The Supreme Court of the United States has held that the fourteenth amendment to the Federal Constitution secures the right in state prosecutions to a fair opportunity to arrange for counsel of the accused's own choice. Crooker v. California, 357 U.S. 433 (1958). The right of counsel also extends to the preparation for trial as well as the trial itself. Powell v. Alabama, 287 U.S. 45, 53, 59 (1932).

[8] Miss. Code Ann. §§ 9-1-25 (supreme court justice, circuit court judge, chancellor), 9-9-9 (1972) (county judge not to practice law in the courts of the county wherein he holds court).

[9] *Id.* § 97-11-3.

[10] *Id.*

[11] Miss. Code Ann. § 19-23-13 (Supp. 1975), *amending* Miss. Code Ann. § 19-23-13 (1972).

[12] Miss. Code Ann. § 73-3-49 (1972). Myers v. State, 296 So. 2d 695 (Miss. 1974) held that this statute only prohibits the partner of a county attorney from representing a criminal defendant in the county where the county attorney serves.

peace or of the mayor who will hear, or has heard, the case.[13] However, when the trial court denies a defendant the right to employ counsel of his choice, where defendant's chosen counsel is not disqualified by law and is to be paid by the defendant or persons other than the state, such action violates the defendant's constitutional right and constitutes reversible error.[14] Nor is a temporary improper withdrawal by the court of defendant's chosen counsel cured by reinstatement of that counsel at a time so close to trial that counsel is without a reasonable opportunity to prepare for trial.[15]

The right to employ the counsel of one's choice is contingent upon the availability to defendant of the means to employ such counsel at the critical stages of the proceedings. An indigent defendant is not entitled to a continuance of his trial so that he can work and earn money with which to employ an attorney,[16] nor is he entitled to a continuance so that his relatives may help him obtain an attorney.[17]

A defendant may take a voluntary substitution of counsel during the proceedings against him, including the trial itself, but such voluntary substitution is not, of itself, grounds for a continuance.[18] An attorney coming into the case after the trial has begun must accept the case in the posture in which he finds it.[19]

A person is entitled to retain and be represented by counsel of his choice at every stage of a criminal proceeding where his substantial rights may be affected,[20] and also at those post-conviction proceedings at which the state would have no absolute obligation to provide him counsel if he were indigent, such as at preliminary and final parole revocation hearings[21] and at preliminary and final probation revocation hearings.[22] The absolute right to be represented by retained counsel at such revocation proceedings is guaranteed by the rules of the Missis-

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[13] MISS. CODE ANN. § 73-3-47 (1972).

[14] Myers v. State, 296 So. 2d 695 (Miss. 1974).

[15] *Id.*

[16] Burnett v. State, 285 So. 2d 783 (Miss. 1973).

[17] *Id.*

[18] Ladnier v. State, 273 So. 2d 169 (Miss. 1973).

[19] *Id.*

[20] Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[21] *Ex parte* Laird, 305 So. 2d 357, 357-58 (Miss. 1974); *see* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); Morrissey v. Brewer, 408 U.S. 471, 489 (1972). However, there will remain some instances in which fundamental fairness will require that the state appoint counsel for indigent probationers or parolees. See notes 48 & 49 and accompanying text *infra*.

[22] Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).

sippi Probation and Parole Board[23] and is not a right imposed by judicial decisions.[24]

2. Right of an Indigent to Appointed Counsel

The federal constitutional right of an indigent defendant in a state trial to have court-appointed counsel to assist the accused in preparing and presenting the defense was first acknowledged in 1932 as being applicable in a capital case where the defendant is "unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like . . . ."[25] The right of an indigent to appointed counsel has since been expanded to include all trials for felonies,[26] trials for misdemeanors where the judge has the authority to imprison the defendant upon conviction,[27] adjudicatory youth court hearings where commitment to a state institution may follow,[28] and in general, "every stage of a criminal proceeding where substantial rights of a criminal accused may be affected,"[29] including sentencing[30] and appeals of right.[31]

Moreover, indigent defendants have the right to the presence of appointed counsel at any critical stage of the prosecution. This right

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[23] RULES OF THE MISS. PROBATION & PAROLE BD. ¶ 3(c).

[24] *Ex parte* Laird, 305 So. 2d 357, 358 (Miss. 1974) (concurring opinion); *see* Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973).

[25] Powell v. Alabama, 287 U.S. 45, 71 (1932).

[26] Gideon v. Wainwright, 372 U.S. 335, 344 (1963). The right extended in *Gideon* is fully retroactive. Kitchens v. Smith, 401 U.S. 847 (1971). Section 99-15-15 of the 1972 Mississippi Code provides:

> When any person shall be charged with a felony, misdemeanor punishable by confinement for ninety (90) days or more, or commission of an act of delinquency, the court . . ., being satisfied that such person is an indigent person and is unable to employ counsel, may in [its] discretion . . . appoint counsel to defend him.
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> . . . .
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> The accused shall have such representation available at every critical stage of the proceeding against him where a substantial right may be affected.

[27] Argersinger v. Hamlin, 407 U.S. 25, 37, 40 (1972). The right extended in *Argersinger* is also retroactive if the petitioner can allege and prove an existing case sufficient to invoke federal jurisdiction. Berry v. City of Cincinnati, 414 U.S. 29 (1973); *see* MISS. CODE ANN. § 99-15-15 (1972).

[28] *In re* Gault, 387 U.S. 1, 41 (1967), *cited by In re* Gressett, 272 So. 2d 921 (Miss. 1973); Love v. State, 221 So. 2d 92 (Miss. 1969); *see* MISS. CODE ANN. § 99-15-15 (1972).

[29] Mempa v. Rhay, 389 U.S. 128, 134 (1967).

[30] *Id.*; *see* Townsend v. Burke, 334 U.S. 736 (1948).

[31] Bennett v. State, 293 So. 2d 1 (Miss. 1974), *citing* Douglas v. California, 372 U.S. 353, 355 (1963); *see* MISS. SUP. CT. R. 37. However, the due process clause does not require a state to provide an indigent appellant with counsel on a discretionary appeal. Ross v. Moffitt, 417 U.S. 600, 611 (1974).

refers to events occurring at or after the formal "initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."[32] Counsel is not required at a *pre-indictment* lineup or showup,[33] or other pre-indictment confrontation,[34] or at the time the defendant is photographed by the police.[35]

Such critical stages,[36] however, do include custodial interrogation,[37] the preliminary hearing,[38] arraignment,[39] post indictment lineups,[40] and

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[32] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[33] Hobson v. State, 285 So. 2d 464 (Miss. 1973), *citing* Kirby v. Illinois, 406 U.S. 682 (1972); Allen v. State, 274 So. 2d 136 (Miss. 1973); Chandler v. State, 272 So. 2d 641 (Miss. 1973); Auman v. State, 271 So. 2d 427 (Miss. 1973).

[34] Auman v. State, 271 So. 2d 427 (Miss. 1973). However,

> [a]s the Court pointed out in *Wade* . . . it is always necessary to "scrutinize *any* pretrial confrontation. . . ." 388 U.S. at 227. The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification. *Stovall v. Denno*, 388 U.S. 293; *Foster v. California*, 384 U.S. 440. When a person has not been formally charged with a criminal offense, *Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime.

Kirby v. Illinois, 406 U.S. 682, 690-91 (1972) (italics in original).

[35] Auman v. State, 271 So. 2d 427 (Miss. 1973). Under the provisions of MISS. CODE ANN. § 99-15-13 (1972), the police are authorized to fingerprint and photograph a defendant after he is lawfully arrested.

[36] For a discussion of the elements of what constitutes a "critical event," see United States v. Ash, 413 U.S. 300 (1973).

[37] Miranda v. Arizona, 384 U.S. 436 (1966). See text accompanying notes 57 through 72 *infra* for a discussion of the provisions of *Miranda* and subsequent decisions as to the right to counsel during interrogation.

[38] Coleman v. Alabama, 399 U.S. 1 (1970); McHale v. State, 284 So. 2d 42 (Miss. 1973).

[39] Hamilton v. Alabama, 368 U.S. 52 (1961) held that failure to appoint counsel at arraignment deprived the petitioner of due process, notwithstanding the fact that he simply pleaded not guilty, because under Alabama law, certain defenses had to be raised then or be abandoned; hence in Alabama, arraignment was a critical stage of the proceedings.

In Mississippi, a number of defenses are also required to be raised at arraignment and the advice of counsel is essential to the preservation of such defenses and rights. For example:

> the trial judge . . . [should] ascertain at the time of defendant's arraignment whether the defendant is aware of his constitutional right to object to the composition of the grand jury that indicted him and the trial jury that is to try him.

Fondren v. State, 199 So. 2d 625, 626 (Miss. 1967).

In Polk v. State, 288 So. 2d 452 (Miss. 1974), although defendant did not have an attorney at the time the grand jury was impaneled, counsel was appointed the day after indictment, and the trial court granted a hearing on the question of the selection of the

other identifications at which the defendant is present and counsel may be needed to counter prosecutorial overreaching.[41] On appeal, the burden is upon the state to show that the appellant had an attorney at all critical points of the criminal prosecution or to show that the defendant effectively waived his constitutional right to have such counsel. Otherwise, evidence obtained during these confrontations with the defendant will not be admissible against the defendant.[42]

A person on probation is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing,[43] but

> [t]he revocation of parole is not a part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations . . . .[44]

Nor does the right to court-appointed counsel attach to probation revocations at which no sentencing occurs.[45] The state is not under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases,[46] but there will remain certain cases in which funda-

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jury list from which the grand jury was chosen, thus preserving defendant's right to counsel at every critical step of the prosecution against him.

Where the defendant wishes to plead guilty at arraignment, the trial court must follow the rules set forth in Alexander v. State, 226 So. 2d 905 (Miss. 1969) and Carlton v. State, 254 So. 2d 770 (Miss. 1971) before accepting a plea of guilty from a defendant. Taylor v. State, 285 So. 2d 172 (Miss. 1973).

[40] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). For an explanation of the *Wade-Gilbert* rule, see Simmons v. United States, 390 U.S. 377, 382-83 (1968). For a general discussion of the Mississippi Supreme Court's current regard for *Wade*, see Allen v. State, 274 So. 2d 136 (Miss. 1973).

[41] United States v. Ash, 413 U.S. 300 (1973); Russell v. United States, 408 F.2d 1280 (D.C. Cir. 1969), *cert. denied*, 395 U.S. 928 (1969); Allen v. State, 274 So. 2d 136 (Miss. 1973). However, *United States v. Wade* does not apply where the defendant voluntarily enters into a police lineup. 274 So. 2d at 138.

[42] Jolly v. State, 269 So. 2d 650 (Miss. 1972).

[43] Mempa v. Rhay, 389 U.S. 128, 137 (1967).

[44] Morrissey v. Brewer, 408 U.S. 471, 480 (1972). The Court went on to say that

> [p]arole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.

Id.; *see* Gardner v. Collier, 274 So. 2d 662, 664 (Miss. 1973).

[45] Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973). In Mississippi, both revocation of probation hearings and combination revocation of probation and sentencing hearings may be encountered. MISS. CODE ANN. § 47-7-37 (1972). Under section 47-7-33, circuit and county courts have the power either to suspend the imposition of sentence or to suspend the execution of a sentence already imposed by the court. Leonard v. State, 271 So. 2d 445 (Miss. 1973).

[46] Gagnon v. Scarpelli, 411 U.S. 778, 787 (1973).

mental fairness will require that the state appoint counsel for indigent probationers or parolees.[47]

> Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.[48]

A defendant cannot base a claim of inadequate representation upon his refusal to cooperate with appointed counsel,[49] nor can a defendant assail the adequacy of his appointed counsel's performance and at the same time muzzle his counsel's reply by claiming the attorney-client privilege.[50] Should an indigent defendant wish to dismiss his court-appointed attorney, his motion for such dismissal is addressed to the sound discretion of the trial judge.[51] However, if the indigent defendant decides that he wishes to proceed without an attorney, and his decision to waive counsel is intelligent and competent,[52] as determined by the trial judge after reasonable examination by the court, the indigent defendant must be allowed to waive the right to appointed counsel and proceed without an attorney.[53] In this event, the determination by the trial court that the waiver was intelligent and competent, and the facts on which the determination is based, must appear in the record[54] because no waiver of counsel may be inferred from a silent trial record.[55]

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[47] *Id.* at 790.

[48] *Id.*, *quoted in Ex parte* Laird, 305 So. 2d 357, 358 (Miss. 1974).

[49] Evans v. State, 273 So. 2d 495 (Miss. 1973).

[50] *Id.*

[51] Burnett v. State, 285 So. 2d 783 (Miss. 1973).

[52] Conn v. State, 251 Miss. 488, 495, 170 So. 2d 20, 23 (1964), *followed in* Hogue v. State, 253 Miss. 667, 168 So. 2d 677 (1965); Plummer v. State, 252 Miss. 45, 172 So. 2d 547 (1965); Clarke v. State, 251 Miss. 627, 170 So. 2d 575 (1965).

[53] Faretta v. California, 95 S. Ct. 2525 (1975). A defendant in a state criminal trial has an independent constitutional right of self-representation, and the defendant may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so.

[54] Conn v. State, 251 Miss. 488, 495, 170 So. 2d 20, 23 (1964).

[55] Carnley v. Cochran, 369 U.S. 506 (1962).

3. Right to Counsel During Custodial Interrogation

a. Nature of the Right

In *Miranda v. Arizona*,[56] the United States Supreme Court held that the right to counsel extended to the right to counsel's presence during a custodial interrogation.[57] This includes both a right to consult with counsel before questioning begins and a right to have counsel present during any and all questioning.[58] However, the state is not required to provide "instant counsel" to the indigent arrestee who requests appointed counsel; the requirement is only that counsel be provided him before interrogation begins.[59] Similarly, if the authorities decide not to provide the person detained with counsel during a reasonable period while they conduct further investigations other than custodial interrogation, "they may refrain from doing so without violating the arrestee's Fifth Amendment privilege so long as they do not question him during that time."[60]

In *Miranda*, the Court prohibited introduction by the prosecution of statements made by the defendant during custodial interrogation unless the prosecution first demonstrated to the trial court that the defendant's privilege against self-incrimination was not violated.[61] The Court also recognized the several secondary benefits which could accrue by virtue of counsel's presence during custodial interrogation.[62] The lawyer can ensure that any statements by his client are accurately recorded and reported at trial.[63] His presence will also reduce the temptation for the police to coerce answers, and if such coercion does occur the lawyer can testify to it in court.[64]

A person held in custody for questioning "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ."[65] This warning is an absolute prerequisite to custodial interrogation,[66] and there can be no effective waiver of the right to counsel during custodial interrogation unless that

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[56] 384 U.S. 436 (1966).

[57] *Id.* at 444. The Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444-45.

[58] *Id.* at 470.

[59] Holifield v. State, 275 So. 2d 851, 855 (Miss.), *cert. dismissed*, 414 U.S. 990 (1973).

[60] Miranda v. Arizona, 384 U.S. 436, 474 (1966).

[61] *Id.* at 470.

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 471.

[66] *Id.*

waiver is specifically made after this warning is given.[67] The warning must further inform the person held in custody that if he is indigent, but desires to consult with an attorney, an attorney will be appointed to represent him, and he may consult with his appointed attorney before any interrogation takes place.[68]

On three separate occasions the Mississippi Supreme Court has held that defendants were properly advised of their *Miranda* rights, when the warnings given them included the content of the four specific warnings in *Miranda*[69] plus the statement that: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."[70] In the most recent of these decisions,[71] however, the court recognized the possible constitutional inadequacies of this language and advised law enforcement officers to delete "if and when you go to court" from future warnings.[72] The Mississippi court has also held that advice by law enforcement officers as to the practical effect of waiving one's *Miranda* rights may render the defendant's statements inadmissible.[73] In *White v. State*,[74] the defendant was given a form to sign which specifically waived his *Miranda* rights. The sheriff then told the defendant that the only thing he would waive by signing the form was his right to have counsel present during questioning. The court held that the sheriff's advice destroyed the advisory effect of the *Miranda* warnings and rendered the defendant's subsequent statement inadmissible.[75]

b. When the Right to Counsel Attaches

The right to counsel provided by the *Miranda* rule is restricted to custodial interrogation.[76] Two conditions must be satisfied for custodial

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[67] *Id.* at 470.

[68] *Id.* at 474.

[69] The *Miranda* Court said that the defendant must be warned

> [t]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires . . . .

Id. at 479.

[70] Burge v. State, 282 So. 2d 223, 226 (Miss. 1973), *cert. denied*, 415 U.S. 985 (1974); Holifield v. State, 275 So. 2d 851, 853-54 (Miss.), *cert. dismissed*, 414 U.S. 990 (1973); *see* Evans v. State, 275 So. 2d 83, 86 (Miss. 1973).

[71] Burge v. State, 282 So. 2d 223 (Miss. 1973), *cert. denied*, 415 U.S. 985 (1974).

[72] *Id.* at 227.

[73] White v. State, 290 So. 2d 616, 619 (Miss. 1974).

[74] 290 So. 2d 616 (Miss. 1974).

[75] *Id.* at 619.

[76] See note 57 *supra*.

interrogation to exist: (1) questioning must be initiated by law enforcement officers, and (2) such questioning must take place after a person has been taken into custody.[77] A person is considered to be in custody for the purpose of the *Miranda* rule when he is deprived of his freedom of action in any significant manner, and he is aware of such restraint.[78]

The deprivation of freedom of action does not require confinement at a police station or in a police vehicle; it may take place anywhere, including a suspect's own bedroom while he is lying in his own bed.[79] But any custodial interrogation of a person, wherever it occurs, must be preceded by his being given the *Miranda* warnings.[80] However, the mere presence of a police officer is not to be considered a restraint on the suspect's liberty,[81] and the fact that an officer is suspicious of an individual is not the test as to whether *Miranda* warnings must be given prior to questioning.[82]

A recognized exception to the requirement of giving the *Miranda* warnings is general on-the-scene questioning of persons not under restraint as to facts surrounding a crime, or other general questioning of citizens in the factfinding process.[83] Officers in the presence of a suspect are not required to turn a deaf ear to the suspect's voluntary statements nor must they interrupt a suspect and advise him of his rights in order to preserve the admissibility of the statement.[84] The *Miranda* warnings advising of the right to counsel need only be given when the two-step custody test is satisfied,[85] and even then, only when questioning is initiated by law enforcement officers.[86] Thus a voluntary and spontaneous

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[77] Miranda v. Arizona, 384 U.S. 436, 444 (1966).

[78] Roberts v. State, 301 So. 2d 859, 863 (Miss. 1974). In *Roberts*, the Mississippi Supreme Court held that where the suspect was questioned in her front yard by the sheriff but was not under arrest nor deprived of her freedom of action in any significant manner at the time she responded to the sheriff's questions, and she was not aware of any restraint on her freedom of action, the sheriff was not required to give the *Miranda* warning prior to questioning her. Her responses were held to be voluntary, legally obtained, and properly admitted into evidence.

[79] Orozco v. Texas, 394 U.S. 324, 327 (1969).

[80] Roberts v. State, 301 So. 2d 859, 862 (Miss. 1974).

[81] *Id.* at 863, *citing* State v. Bainch, 109 Ariz. 77, 505 P.2d 248, 250 (1973).

[82] Roberts v. State, 301 So. 2d 859, 863 (Miss. 1974).

[83] Miranda v. Arizona, 384 U.S. 436, 477 (1966); Norman v. State, 302 So. 2d 254, 259 (Miss. 1974).

[84] Miranda v. Arizona, 384 U.S. 436, 478 (1966); Burge v. State, 282 So. 2d 223, 226-27 (Miss. 1973), *cert. denied*, 415 U.S. 985 (1974).

[85] *See* Roberts v. State, 301 So. 2d 859, 863 (Miss. 1974). See text accompanying note 78 *supra*.

[86] *See* Brown v. State, 293 So. 2d 425 (Miss.), *cert. denied*, 419 U.S. 1001 (1974). In *Brown*, a conversation between the appellant and the homicide victim's mother while the appellant was in jail was held not to be a custodial interrogation within the meaning of

statement made by a person in custody before he is given his *Miranda* warnings is admissible if it is made without any prompting or interrogation.[87] After a person in custody has been warned, his voluntary statement is admissible whether it is spontaneous or in response to questioning or prompting.[88]

The *Miranda* warnings, once given, may be held to be effective several hours later.[89] A person having been given the warnings, and having acknowledged understanding them, may be held to have been warned effectively, even though the warnings were not given again immediately before the custodial interrogation took place.[90]

4. Discovery Opportunities Available to Defendant's Counsel

a. Scope of Discovery

Discovery by defense counsel of information available to the prosecution that would be useful in preparing an effective defense is extremely limited in Mississippi criminal actions. The only substantial gain in criminal discovery rights of defendants has been in inspection of *tangible* evidence. Although it is discretionary with the trial judge, the judge may and should permit a defendant to inspect tangible evidence which may be used against him or which may be useful in his defense.[91] This does not mean that a defendant may peruse the prosecutor's private files or notes, but it does mean that the concepts of "due process" and "fair trial" require that material tangible evidence not be concealed from a defendant.[92] The United States Supreme Court has held on several occasions that the prosecutor's withholding or concealing material evidence favorable to an accused in a state criminal trial is a violation of the due process clause.[93] The types of tangible evidence that

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Miranda, and the conversation was admissible into evidence because the court found that the mother's inquiry was not instigated by anyone connected with any law enforcement agency, and appellant's statements to her were made freely and voluntarily.

[87] Burge v. State, 282 So. 2d 223, 226 (Miss. 1973), *cert. denied*, 415 U. S. 985 (1974); Fabian v. State, 267 So. 2d 294, 296 (Miss. 1972); Boyles v. State, 223 So. 2d 651, 654-55 (Miss. 1969), *cert. denied*, 396 U.S. 1005 (1970); Spurlin v. State, 218 So. 2d 876, 878 (Miss. 1969); Nevels v. State, 216 So. 2d 529, 530 (Miss. 1968); *see* Miranda v. Arizona, 384 U. S. 436, 478 (1966).

[88] *See* Burge v. State, 282 So. 2d 223, 226 (Miss. 1973), *cert. denied*, 415 U.S. 985 (1974).

[89] Dean v. State, 300 So. 2d 797, 800 (Miss. 1974), *cert. denied*, 420 U.S. 974 (1975).

[90] Biddy v. State, 277 So. 2d 115, 120-21 (Miss.), *cert. denied*, 414 U.S. 866 (1973).

[91] Bright v. State, 293 So. 2d 818, 823 (Miss. 1974); Jackson v. State, 243 So. 2d 396, 397 (Miss. 1970); Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968).

[92] Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968).

[93] Miller v. Pate, 386 U.S. 1, 2-3 (1967); Brady v. Maryland, 373 U.S. 83, 87 (1963); *see* Alcorta v. Texas, 355 U.S. 28, 31 (1957). In Moore v. Illinois, 408 U.S. 786 (1972), the

the Mississippi court has said should be made available to a defendant for his inspection or analysis include photographs[94] and confessions.[95] The list should include almost all tangible evidence available to the prosecutor and under his control which is not excluded by law.[96] In Mississippi, a defendant is not entitled to inspect, before the trial, statements given to the state by prosecution witnesses.[97] However, after a witness has testified on direct examination, the defendant may move for the production and inspection of the witness' earlier statement and the trial judge has discretion to grant the request.[98]

In cases of alleged possession or sale of a controlled substance where the outcome of the case is dependent upon its identification as contraband, due process requires making a portion of the substance available to the defendant upon request for inspection and analysis.[99] This requirement does not apply if it is necessary for the state to consume all of the substance during chemical analyses performed for the prosecution.[100] However, if the defendant can show that the state deliberately destroyed the substance to avoid making a portion of it available to him, the case will be dismissed.[101]

b. The Indictment

A criminally accused person has a constitutional right to be informed of the nature and cause of the crime with which he is charged.[102] An indictment, to be sufficient to support a conviction, must set forth each constituent element and each material fact of the criminal offense

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Court reviewed the holding of *Brady* and said that

> the standards by which the prosecution's conduct is to be measured are: (a) suppression by the prosecution after a request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of the evidence.

Id. at 794-95.

[94] Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968).

[95] Brady v. Maryland, 373 U.S. 83, 86 (1963); Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968).

[96] *See generally* Annot., 7 A.L.R.3d 8 (1966).

[97] Bellew v. State, 238 Miss. 734, 752-56, 106 So. 2d 146, 153-55 (1958)(and cases cited therein).

[98] Mattox v. State, 243 Miss. 402, 418-20, 139 So. 2d 653, 654 (1962) (providing the procedure to be followed in laying the proper foundation for the motion for production and inspection—the procedure is apparently similar to that provided for federal criminal trials); *see* 18 U.S.C. § 3500 (Supp. IV, 1974).

[99] Jackson v. State, 243 So. 2d 396, 398 (Miss. 1970).

[100] Poole v. State, 291 So. 2d 723, 725-26 (Miss.), *cert. denied*, 419 U.S. 1019 (1974).

[101] 291 So. 2d at 726.

[102] MISS. CONST. art. 3, § 26; *see* Murray v. State, 266 So. 2d 139, 140 (Miss. 1972), *cert. denied*, 411 U.S. 907 (1973).

charged with precision and certainty, and an indictment which fails to charge an essential element is void.[103]

The Mississippi Supreme Court has said:

> An indictment . . . constitutes the "pleading" in a criminal case. Its office is to apprise the defendant of the charge against him in fair and intelligible language (1) in order that he may be able to prepare his defense, and (2) the charge must be laid with sufficient particularity of detail that it may form the basis of a plea of former jeopardy in any subsequent proceedings.[104]

A copy of the indictment is required by statute to be served on the accused after arrest and prior to arraignment.[105] However, in a noncapital case, the accused may waive the right to receive a copy of the indictment by failing to raise the objection in the trial court.[106]

The right of the accused to be informed, by indictment or otherwise, with precision and certainty, of the constituent elements of the crime charged does not extend to the right to be advised with particularity as to all aspects of the crime charged. For example, the identity of a person to whom contraband is delivered is not essential to an indictment,[107] although such identification is not forbidden and could add particularity to the indictment.[108] In *Bright v. State*,[109] the court said: "[I]t is still the law of this state that the state is not required to give the defendant a bill of particulars."[110] Thus, the defendant need not be informed by

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[103] Burchfield v. State, 277 So. 2d 623, 625 (Miss. 1973); Love v. State, 211 Miss. 606, 610-12, 52 So. 2d 470, 471-72 (1951). However, an indictment is not insufficient for failing to state, or improperly stating, the time at which the offense was committed in any case where time is not of the essence. Miss. Code Ann. § 99-7-5 (1972).

[104] Westmoreland v. State, 246 So. 2d 487, 489 (Miss. 1971), *cert. denied*, 404 U.S. 1038 (1972), *quoted in* Umphress v. State, 295 So. 2d 735, 736 (Miss. 1974), *and* Grantham v. State, 284 So. 2d 523, 525 (Miss. 1973); *see* Kelly v. State, 204 Miss. 79, 88-89, 36 So. 2d 925, 926 (1948).

[105] Miss. Code Ann. § 99-7-9 (1972).

[106] Hubbard v. State, 285 So. 2d 170, 171 (Miss. 1973).

[107] Young v. State, 245 So. 2d 26, 27 (Miss. 1971); Lea v. State, 64 Miss. 201, 203, 1 So. 51 (1887).

[108] Umphress v. State, 295 So. 2d 735, 737 (Miss. 1974).

[109] 293 So. 2d 818 (Miss. 1974).

[110] *Id.* at 823; *accord*, Robinson v. State, 253 So. 2d 398, 400 (Miss. 1971); McDaniel v. State, 191 Miss. 854, 856, 4 So. 2d 355 (1941); Starling v. State, 90 Miss. 255, 272, 43 So. 952, 955 (1907). This is most prejudicial to an accused who is in fact innocent of the crime charged. The accused may have no way of determining when and where the crime charged was committed, and may thereby be impeded in establishing an effective defense, such as an alibi. Compare the more favorable situation of an accused who because he is in fact guilty, knows, or had the opportunity to know, when and where he committed the crime with which he is charged. In *Starling*, the Mississippi Supreme Court refused to require the prosecution to provide certain information because the court said that the

the indictment of the time and place where the crime was alleged to have occurred,[111] the persons present,[112] or the list of the names of the state's witnesses.[113] The trial court may require the state to divulge information of this nature that is essential to the proper defense of a prosecution,[114] but it is not reversible error for the trial judge to refuse to do so.[115]

5. Services Available to an Indigent Defendant

In Mississippi, an indigent defendant's right to services provided or financed by the state is limited to those services guaranteed by constitution or statute. In addition to having the services of appointed attorneys, other available services include: (1) the constitutional right "to have compulsory process for obtaining witnesses in his favor,"[116] (2) the statutory right to receive a copy of the affidavit filed or the indictment returned against him free of charge,[117] (3) the statutory right to have his court-appointed attorneys reimbursed by the county where the trial was held for the actual expense incurred by them during the preparation and presentation of his appeal,[118] and (4) the statutory right to appeal his

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information requested was both readily accessible and well known to the defendant who, the evidence showed, had prepared it in the first place. The court said that a party is not obliged to furnish facts already known to his adversary. *Id.* at 272, 43 So. at 955. Other holdings on this question have been by stare decisis without an examination or statement of compelling reasons for retaining this harsh rule of law. *See, e.g.*, Wilson v. State, 221 So. 2d 100, 103 (Miss. 1969); Andrews v. State, 237 Miss. 875, 880, 116 So. 2d 749, 751 (1960); Jones v. State, 215 Miss. 355, 361, 60 So. 2d 805, 806 (1952); Sanders v. State, 141 Miss. 289, 303, 105 So. 523, 525 (1925); Quick v. State, 133 Miss. 634, 643, 98 So. 108, 109 (1923); Westbrooks v. State, 76 Miss. 710, 713, 25 So. 491, 492 (1899). A terse holding was made in *Quick*, despite statements in the state's brief advising the court that Mississippi's practice of not entitling a defendant to a bill of particulars in a criminal case was a minority position. 133 Miss. at 641. It is difficult to comprehend how this antiquated rule of law promotes fairness and justice or can be construed to be consistent with the concept of "due process" and "fair trial." Perhaps challenges of this rule in the future should be pursued as a violation of the due process clause of the fourteenth amendment, thereby raising a federal question as a basis for further appeal.

[111] Bright v. State, 293 So. 2d 818, 822-23 (Miss. 1974).

[112] McDaniel v. State, 191 Miss. 854, 855-56, 4 So. 2d 355 (1941).

[113] *Id.* at 856, 4 So. 2d at 355.

[114] This is true except where the essential information is the identification of an informer who is present and either an eyewitness to or a participant in the crime. Sims v. State, 313 So. 2d 27, 30 (Miss. 1975); Mills v. State, 304 So. 2d 651, 654 (Miss. 1974); Ward v. State, 293 So. 2d 419, 421 (Miss. 1974).

[115] Bright v. State, 293 So. 2d 818, 823 (Miss. 1974).

[116] U.S. CONST. amend. VI; MISS. CONST. art. 3, § 26; *see* MISS. CODE ANN. § 99-15-15 (1972).

[117] MISS. CODE ANN. § 99-15-28 (Supp. 1975).

[118] *Id.* § 99-15-17.

conviction in forma pauperis without posting an appeal bond or a deposit for costs.[119] The scope of rights related to appeal is sufficiently broad to bring Mississippi within the requirement of *Griffin v. Illinois*[120] that destitute defendants must be afforded as adequate an appellate review as defendants who can afford to pay the costs of appeal.[121]

An indigent defendant in Mississippi does not presently have a right to the services of state-appointed experts or a right to be advanced funds or to be reimbursed for the costs of obtaining the assistance of private experts. In the three decisions to date on the issue of state-appointed or state-financed experts to assist an indigent defendant, the Mississippi Supreme Court decided that (1) a defendant with a history of mental illness was not entitled to the services of a court-appointed psychiatrist to assist the court-appointed defense attorney in determining whether the defendant should plead not guilty by reason of insanity;[122] (2) a defendant charged with possession of marijuana was not entitled to a private investigator and a chemist at state expense;[123] and (3) a defendant charged with sale of marijuana was not entitled to employ an expert chemist at state expenses.[124] However, a careful reading of the most recent of the three decisions suggests that the Mississippi Supreme Court is not as firmly entrenched in its opposition to providing an indigent with expert assistance at state expense as it previously was.[125] If a proper showing was made that "manifest injustice" would occur without such assistance or that the concepts of "due process" and

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[119] *Id.* § 99-35-7 (1972) (appeal from conviction in a justice court to the circuit court); *id.* § 99-35-105 (appeal to the supreme court).

[120] 351 U.S. 12 (1956).

[121] *Id.* at 19 (including the right to a transcript on appeal).

[122] Phillips v. State, 197 So. 2d 241, 242-44 (Miss. 1967). The basis for the court's decision was that

> [n]either the United States Constitution nor the Mississippi Constitution requires that the Nation or State furnish an indigent defendant with the assistance of a psychiatrist. The only assistance that they require is the assistance of legal counsel.

Id. at 244.

[123] Laughter v. State, 235 So. 2d 468, 472 (Miss. 1970). The court's rationale for its decision was that "[t]here is no precedent for this and therefore it is disallowed." *Id.*

[124] Bright v. State, 293 So. 2d 818, 822 (Miss. 1974).

[125] *Id.* The court noted that a substantial split of authority exists as to whether, in the absence of a statute providing for such, an indigent defendant is entitled to the aid of expert witnesses at government expense. However, after citing cases from several jurisdictions, including state and federal courts, the court found that "[t]he right to expert witnesses for the defendant at the expense of the state or county has been generally denied by most of the state courts." *Id.* at 822. The court went on to conclude "that the trial court was correct in denying the petitioner the right to employ an expert witness at the expense of the state." *Id.*

"fair trial" would be flagrantly abused without such assistance, the court might now be persuaded to take exception to its present absolute denial of expert assistance at state expense.

II. RIGHT OF CONFRONTATION

A. *Nature of the Right of Confrontation*

The right of an accused in a criminal prosecution to confront the witnesses against him is guaranteed by the Mississippi Constitution[126] and the United States Constitution.[127] In 1965, the right of confrontation guaranteed by the federal constitution was made obligatory on the states by the due process clause of the fourteenth amendment in *Pointer v. Texas*.[128] The primary objective of the confrontation clause is to prevent depositions or *ex parte* affidavits from being used against an accused where the in-court testimony of witnesses subject to cross-examination is available.[129] The right of confrontation assures that available witnesses against the defendant will testify in court, under oath, and under the scrutiny of the jury, and will thus be subject to cross-examination by the defendant and to the penalty for perjury.[130]

The right of confrontation is a criminal trial right.[131] It is a personal right and may be waived by the accused.[132] It is implemented in practice by guaranteeing the accused three distinguishable rights: (1) the right to be present at every stage of the trial;[133] (2) the right to be confronted

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[126] MISS. CONST. art. 3, § 26 provides in part: "In all criminal prosecutions the accused shall have a right . . . to be confronted by the witnesses against him . . . ."

[127] U.S. CONST. amend. VI provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

[128] 380 U.S. 400, 403 (1965). In *Pointer* the Court noted:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Id. at 405.

[129] Barber v. Page, 390 U.S. 719, 721 (1968); Mattox v. United States, 156 U.S. 237, 242-43 (1895).

[130] California v. Green, 399 U.S. 149, 158 (1970).

[131] Barber v. Page, 390 U.S. 719, 725 (1968); Lipscomb v. State, 76 Miss. 223, 244, 25 So. 158, 161 (1899). The right of confrontation has no application to habeas corpus proceedings because such proceedings are civil proceedings and not criminal prosecutions. Ullom v. Davis, 169 Miss. 208, 150 So. 519 (1933).

[132] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974); Stringer v. State, 279 So. 2d 156, 159 (Miss. 1973); Brewer v. State, 233 So. 2d 779, 780 (Miss. 1970); Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969); MISS. CODE ANN. § 99-17-9 (1972) (provides that defendant may waive the right to be present).

[133] Illinois v. Allen, 397 U.S. 337, 338 (1970); Lewis v. United States, 146 U.S. 370,

in the courtroom by every available witness;[134] and (3) the right to cross-examine the witnesses against him.[135]

1. Right to be Present at Trial

One of the basic rights implied by the confrontation clause is the right of the accused to be present at every stage of his trial.[136] The Mississippi and United States Supreme Courts have long recognized and guarded this right.[137] A felony trial in Mississippi cannot commence unless the accused is in custody[138] and cannot continue in the defendant's absence unless the defendant waives his right to be present[139] or loses his right to be present.[140] In a trial for a misdemeanor, however, the accused may waive his right to appear, voluntarily or through his own misconduct.[141] However, where defendant's failure to appear for a

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372-74 (1892); Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911); Bell v. State, 66 Miss. 192, 194, 5 So. 389 (1889); Scaggs v. State, 16 Miss. (8 S. & M.) 722, 725 (1847).

[134] Barber v. Page, 390 U.S. 719, 725 (1968); Pointer v. Texas, 380 U.S. 400, 405 (1965); Spears v. State, 241 So. 2d 148, 149 (Miss. 1970).

[135] Barber v. Page, 390 U.S. 719, 725 (1968); Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 405 (1965); Stringer v. State, 279 So. 2d 156, 157 (Miss. 1973); Spears v. State, 241 So. 2d 148, 149 (Miss. 1970); Crapps v. State, 221 So. 2d 722, 723-24 (Miss. 1969).

[136] Illinois v. Allen, 397 U.S. 337, 338 (1970); Bell v. State, 66 Miss. 192, 194, 5 So. 389 (1889).

[137] Illinois v. Allen, 397 U.S. 337, 338 (1970); Lewis v. United States, 146 U.S. 370, 372-74 (1892); Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911); Bell v. State, 66 Miss. 192, 194, 5 So. 389 (1889); Scaggs v. State, 16 Miss. (8 S. & M.) 722, 725 (1847).

[138] MISS. CODE ANN. § 99-17-9 (1972) provides in part:

> In criminal cases the presence of the prisoner may be waived, and the trial progress, at the discretion of the court, in his absence, if he be in custody and consenting thereto.

[139] Myers v. State, 268 So. 2d 353, 357-58 (Miss. 1972); Stokes v. State, 240 Miss. 453, 474-77, 128 So. 2d 341, 349-50 (1961) (appellant's attorney waived appellant's presence); Brister v. State, 231 Miss. 722, 725-26, 97 So. 2d 654, 655 (1957); Hamburg v. State, 203 Miss. 565, 570-71, 35 So. 2d 324, 325-26 (1948); MISS. CODE ANN. § 99-17-9 (1972). If defendant claims he did not waive his right to be present, he must also allege and show that he was prejudiced by his absence in order to obtain reversal. Kendall v. State, 249 So. 2d 657, 660-61 (Miss. 1971). See notes 212 through 227 and accompanying text *infra*.

[140] Illinois v. Allen, 397 U.S. 337, 343 (1970). See text accompanying notes 145 through 155 *infra*.

[141] MISS. CODE ANN. § 99-17-9 (1972) provides in part:

> If the defendant, in cases less than felony, be on recognizance or bail or have been arrested and escaped, or have been notified by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be

misdemeanor trial is through no fault of his own, as by reason of illness, he cannot be said to have been voluntarily absent.[142] If he is then tried in his absence, he is deprived of his constitutional right to be present.[143]

During trial, the defendant has the right to be present during the examination of all witnesses, both those of the state and his own; the court cannot deny or abridge that right by requiring the defendant either to testify first on his behalf or to be sequestered during the testimony of his witnesses.[144] However, the defendant may waive the right to confront some or all of the witnesses or may waive his right to be present at some of the stages of trial by his own consent, such as when he voluntarily leaves the courtroom without requesting leave of the court or when he voluntarily absents himself from an in-chambers conference.[145]

A defendant may forfeit the right of confrontation by his own misconduct.[146] In *Illinois v. Allen*[147] the United States Supreme Court held that after a disorderly defendant has been warned by the trial judge that continued disruptive behavior would result in his removal from the courtroom, the defendant can be removed from the courtroom and the trial continued in his absence if the defendant persisted in obstructing the trial.[148] A defendant who has lost his right to be present during his trial can reclaim it by notifying the judge that he will conduct himself properly if readmitted to the courtroom.[149]

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taken, or be in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment final and sentence be awarded as though such defendant were personally present in court.

See Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911); Williams v. State, 103 Miss. 147, 150, 60 So. 73 (1912).

[142] Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911). However, the granting of a continuance based on the affidavit of a physician that defendant is too ill to stand trial is not to be placed solely within the power of a defendant. The court may appoint physicians to examine the defendant and have them report directly to the court on the defendant's physical condition. Lipscomb v. State, 76 Miss. 223, 243, 25 So. 158, 161 (1899).

[143] Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911).

[144] Garmon v. State, 66 Miss. 196, 198, 5 So. 385, 385-86 (1889); Bell v. State, 66 Miss. 192, 194, 5 So. 389 (1889). *Bell* was cited by the United States Supreme Court as the leading case in Brooks v. Tennessee, 406 U.S. 605, 608-09 (1972), where the Court held that a Tennessee statute that required a defendant to speak first in his own defense was "an impermissible restriction on the defendant's right against self-incrimination . . . ."

[145] Myers v. State, 268 So. 2d 353 (Miss. 1972).

[146] Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Diaz v. United States, 223 U.S. 442, 455-58 (1912).

[147] 397 U.S. 337 (1970).

[148] *Id.* at 343.

[149] *Id.*

In *Allen*, the Court said that a trial judge can handle an obstreperous defendant in one of three constitutionally permissible ways to maintain courtroom order: (1) the defendant can be bound and gagged and kept in the courtroom; (2) the defendant can be cited for contempt; or (3) the defendant can be removed from the courtroom until he agrees to behave himself.[150] The Court indicated a preference for the use by the trial court of its contempt power and for its related power to discontinue the trial and try the defendant at a later time.[151] However, the Court noted that if the defendant was determined to prevent any trial, citation for contempt would be ineffective,[152] and that a defendant might benefit from his disruptive act if a delay in the trial caused witnesses against him to become unavailable.[153]

The Court viewed with general disfavor the alternative of binding and gagging the defendant, saying that the sight of the restraints might significantly affect the jury and that this technique was an affront to the dignity of the trial court.[154] Nevertheless, the Court concluded that this method of controlling the defendant might, in some situations, be the fairest way of handling the defendant.[155] However, in *Rush v. State*[156] the Mississippi Supreme Court stated that a defendant has a common law right to be free from any sort of shackles or bonds while in court in the presence of the jury, unless such devices are required to prevent his escape or assault on other persons in the courtroom.[157] The *Rush* court, while not discussing the situation of disorderly conduct by the defendant, stated that violation of this common law right could be ground for reversal.[158]

In view of the *Allen* and *Rush* decisions, and of section 99-17-9 of the Mississippi Code of 1972,[159] which allows the trial to take place in the defendant's absence if he consents, it seems reasonable to conclude that in Mississippi, if the defendant is unresponsive to the court's contempt power, the most acceptable method of controlling his disruptive conduct is to remove him from the courtroom until he agrees to behave, and to continue the trial in his absence. The rationale for this conclusion is that a defendant who refuses to behave in the courtroom consents by way of his disruptive conduct to being tried *in absentia*.

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[150] *Id.* at 343-44.
[151] *Id.* at 345.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 344.
[155] *Id.*
[156] 301 So. 2d 297 (Miss. 1974).
[157] *Id.* at 300.
[158] *Id.*
[159] See notes 141 through 144 and accompanying text *supra*.

2. Right of Confrontation Distinguished from the Hearsay Rule

It is extremely important that defendant's counsel recognize the distinction between hearsay and violation of defendant's right of confrontation. The confrontation objection must be timely raised in order to give the trial judge an opportunity to act on the objection and to make an adequate record for appeal. Where applicable, the confrontation objection and the hearsay objection should both be raised. The right of confrontation and the hearsay rule substantially overlap each other because they are generally designed to protect similar values.[160] Both are intended to protect the defendant from being tried on *ex parte* evidence rather than direct and cross-examination of witnesses before the trier of fact.[161] The confrontation clause, however, is *not* a codification of the common law hearsay rule and its exceptions.[162] The United States Supreme Court has found violations of the confrontation clause even though the statements in question were admitted into evidence under recognized exceptions to the hearsay rule.[163] Conversely, violation of the hearsay rule is no basis for automatically concluding that the defendant's confrontation rights have been violated.[164]

a. Basic Differences

The confrontation clause and the hearsay rule may have a common source, but the two should not be equated.[165] The traditional view of the hearsay rule is that an out-of-court statement offered for the truth of what is asserted is generally not admissible because it is lacking in credibility for three reasons: (1) the statement was not made under oath; (2) the declarant was not subject to cross-examination when the statement was made; and (3) the trier of fact was unable to observe the declarant's demeanor when the statement was made.[166] From this rule a number of exceptions have been carved, within which hearsay evidence is admissible because the circumstances under which the hearsay

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[160] California v. Green, 399 U.S. 149, 155 (1970).

[161] Barber v. Page, 390 U.S. 719, 721 (1968); Mattox v. United States, 156 U.S. 237, 242 (1895).

[162] California v. Green, 399 U.S. 149, 155 (1970); *see* Dutton v. Evans, 400 U.S. 74, 86 (1970).

[163] *E.g.*, Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965); *see* California v. Green, 399 U.S. 149, 155-56 (1970).

[164] California v. Green, 399 U.S. 149, 156 (1970) (footnote omitted); *see The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 236-37 (1968); Note, *Confrontation and the Hearsay Rule*, 75 YALE L.J. 1434, 1436 (1966).

[165] Dutton v. Evans, 400 U.S. 74, 86 (1970).

[166] California v. Green, 399 U.S. 149, 154 (1970); *see* C. MCCORMICK, LAW OF EVIDENCE § 245, at 581-82 (2d ed. E. Cleary ed. 1972) [hereinafter cited as MCCORMICK].

statements were made lend special credibility to the statements.[167] These exceptions apply most broadly in civil cases.

The confrontation clause, on the other hand, focuses upon providing the criminally accused with protections at the trial. As such, it acts to provide an additional filter on evidence presented against the defendant. Statements admissible within the hearsay rule or one of its exceptions must also be admissible within the confrontation clause or one of its exceptions to be admissible against the criminally accused. In *California v. Green*,[168] the United States Supreme Court reviewed a conviction made possible by the use of prior inconsistent testimony given at a hearing by a witness who was unresponsive while testifying for the state at trial.[169] Use of the prior inconsistent testimony as substantive evidence under such circumstances is not permissible under the traditional hearsay rule[170] but was admitted in *Green* under a California evidence statute.[171] The California Supreme Court struck down the statute as being violative of the confrontation clause, but the United States Supreme Court reversed, stating that the core of the confrontation clause is the right to confront and cross-examine the witness at the time of the trial.[172] The United States Supreme Court held that the confrontation clause is not violated when a declarant's out-of-court statements are admitted as substantive evidence if the declarant testifies as a witness and is subject to full and effective cross-examination.[173]

Broadly then, the basic difference between the hearsay rule and the confrontation clause seems to be that the protections afforded by the hearsay rule depend upon conditions that existed at the time the statement was made, whereas the protections afforded by the confrontation clause depend upon confronting and cross-examining the declarant at trial. The Court in *Green* noted that even if the declarant's out-of-court statement had been made under circumstances that did not satisfy any of the three hearsay protective conditions, the out-of-court statement regained most of its lost protections when confrontation requirements were complied with, because the declarant testified under oath at trial and could be cross-examined, under the scrutiny of the trier of fact, as to his former statement.[174]

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[167] *See* California v. Green, 399 U.S. 149, 161 (1970).

[168] 399 U.S. 149 (1970).

[169] *Id.* at 151-53.

[170] McCormick, *supra* note 166, § 251, at 601.

[171] 399 U.S. at 154.

[172] *Id.* at 157.

[173] *Id.* at 158.

[174] California v. Green, 399 U.S. 149, 158 (1970). In *Green*, the Court noted that none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial.

Thus, where a witness in a criminal trial testifies as to facts or statements communicated to him by a third party, both the hearsay rule and the confrontation clause are violated[175] unless the facts or statements fall within recognized exceptions to each rule. The hearsay rule is violated because the third party's out-of-court statement was not made under oath, subject to cross-examination, and in the presence of the trier of fact.[176] The confrontation clause is violated because the third-party declarant is not available in court to testify under oath and cannot be cross-examined for what he said out of court. However, when a witness takes the stand and admits or denies having made an out-of-court statement, and then testifies as to the facts in issue and provides the defendant with the opportunity fully to cross-examine him as to his out-of-court statement, admission of the out-of-court statement as substantive evidence violates the traditional hearsay rule because of the circumstances under which the statement was made,[177] but there is no violation of the confrontation clause.[178]

What the confrontation clause requires is that out-of-court statements made by a person who is available to be called as a witness, but who is not called, be excluded from evidence. Consequently, compliance with the confrontation clause requires that the prosecution produce in-court testimony as to the facts that constitute the crime,[179] or, if an out-of-court statement is introduced as substantive evidence, that the prosecution put the declarant of the out-of-court statement on the stand so

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> The concern of most of our cases has been focused on precisely the opposite situation . . . .

Id. at 161. The Court then held that

> the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked [on cross-examination] to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories.

Id. at 164.

[175] *E.g.*, Ratcliff v. State, 308 So. 2d 225, 227 (Miss. 1975); Kelly v. State, 278 So. 2d 400, 402 (Miss. 1973); Butler v. State, 245 So. 2d 605, 607 (Miss. 1971); Spears v. State, 241 So. 2d 148, 149 (Miss. 1970).

[176] McCORMICK, *supra* note 166, § 245, at 582.

[177] *Id.*

[178] Nelson v. O'Neil, 402 U.S. 622, 629-30 (1971); California v. Green, 399 U.S. 149, 157-58, 161, 164 (1970); Cutshall v. State, 203 Miss. 553, 564, 35 So. 2d 318, 322-23 (1948).

[179] *E.g.*, Brewer v. State, 233 So. 2d 779, 780-82 (Miss. 1970); Blackwell v. State, 166 Miss. 524, 146 So. 628 (1933). In *Blackwell*, the Mississippi Supreme Court held that the findings of a coroner's jury are *ex parte* and are not binding on a defendant in a murder case. The court said that to try a person for murder on a coroner's jury verdict would deprive the defendant of his right to confront and cross-examine the witnesses whose testimony brought about his conviction. *Id.* at 528, 146 So. at 629.

that he may be effectively cross-examined under oath, in the presence of the jury, as to his out-of-court statement.[180] If the declarant is shown to be unavailable, then his out-of-court statement must come within an exception to the confrontation clause to be admissible.

b. Exceptions

One recognized exception to the confrontation clause is the admissibility against an accused in a proper case of a dying declaration.[181] Another exception arises when an unavailable witness has given testimony at a previous judicial proceeding against the same defendant. If the witness was subject to cross-examination by the defendant upon substantially the full scope of issues involved in the present trial, his testimony at the former proceeding is admissible.[182] For the previous testimony to qualify, the statement must have been given under circumstances closely approximating those that surround the typical trial: (1) the witness must have been under oath; (2) the defendant must have been represented by counsel or have intelligently waived the right to be

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[180] *See* California v. Green, 399 U.S. 149, 158-59, 161-62, 168 (1970). In his concurring opinion in *Green*, Justice Harlan stated that, in his opinion, the meaning of the confrontation clause is that "a state may not in a criminal case use hearsay when the declarant is available." *Id.* at 186. His statement is not inclusive of the *Green* situation, because in *Green* the Court allowed the state to use hearsay *because* the declarant was available and testified. In Dutton v. Evans, 400 U.S. 74 (1970), in his concurring and tie-breaking opinion, Justice Harlan changed his position on the meaning of the confrontation clause. He stated that he believed that the Court's confusion in *Dutton* arose from the assumption that the central purpose of the confrontation clause is to "prevent overly broad exceptions to the hearsay rule" from being used to convict criminal defendants. *Id.* at 94. Justice Harlan stated that he believed such an assumption to be wrong. *Id.*

This author is of the opinion that the Court's conflict in *Dutton* is one of semantics. The confrontation clause does not focus on what is or is not hearsay or an exception to the hearsay rule because that determination depends upon the conditions under which the out-of-court statement is made. A confrontation objection does not ask the court to evaluate the circumstances under which the out-of-court statement is made to see if those circumstances suggest special reliability. A confrontation objection asks the court to examine the conditions under which the out-of-court statement is offered for admission at trial against the defendant—that is, will the defendant be able to cross-examine the declarant of the statement if the statement is admitted in substantive evidence against him? If the right to cross-examine will be denied because the declarant is unavailable, the confrontation objection asks the judge to examine the conditions under which the out-of-court statement was made only to the extent necessary to determine if an exception to the confrontation clause will permit introduction of the statement anyway.

[181] Pointer v. Texas, 380 U.S. 400, 407 (1965); Mattox v. United States, 146 U.S. 140, 151 (1892).

[182] California v. Green, 399 U.S. 149, 165-66 (1970); Barber v. Page, 390 U.S. 719, 722 (1968); Pointer v. Texas, 380 U.S. 400, 407 (1965); Mattox v. United States, 156 U.S. 237, 240-44 (1895).

represented by counsel; (3) the defendant must have had every opportunity to cross-examine the witness as to his statement; and (4) the proceedings must have been conducted before a judicial tribunal equipped to provide a judicial record of the hearings.[183]

In *California v. Green*[184] the Court held that testimony at a preliminary hearing by one of the state's witnesses satisfied these requirements and would have been admissible if the witness had been unavailable at trial.[185] However, the Court held in *Pointer v. Texas*[186] that testimony given by a state's witness at a preliminary hearing where the defendant was not represented by counsel was not admissible at trial where the witness was unavailable even though defendant had attempted to cross-examine the state's witnesses.[187] In Mississippi, where preliminary hearings in a justice of the peace court are not conducted under circumstances which are conducive to full cross-examination or the preparation of an accurate judicial record of the proceedings, the testimony of a witness at such a hearing probably would not meet the constitutional requisites of *Green*.[188]

Before the earlier testimony of an absent witness is admissible at trial, the absent witness must be shown to be unavailable. Admissibility under a hearsay exception traditionally requires that a declarant be unavailable because of death; absence, whether temporary or permanent, from the jurisdiction; physical disability resulting in inability to testify; or mental incapacity.[189] However, unless the witness is deceased, he is not unavailable for the purpose of the confrontation exception unless the prosecution has also made a good-faith effort to produce him at trial.[190] Where the defendant objects to introduction of the previous testimony on the constitutional ground, the record should show the reason for the witness' absence and should reflect the efforts made by the prosecution to obtain the witness' presence at trial.[191]

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[183] California v. Green, 399 U.S. 149, 165 (1970).

[184] 399 U.S. 149 (1970).

[185] *Id.* at 166.

[186] 380 U.S. 400 (1965).

[187] *Id.* at 407.

[188] *Cf.* Jolly v. State, 269 So. 2d 650, 654-55 (Miss. 1972).

[189] *Id.* at 654.

[190] Barber v. Page, 390 U.S. 719, 724-25 (1968). In *Barber*, the unavailable witness was incarcerated in a federal prison in another state and should have been available through use of the common law writ of habeas corpus *ad testificandum*. For witnesses not in prison, the Uniform Law to Secure the Attendance of Witnesses from Without the State in Criminal Proceedings provides a means whereby prosecuting authorities can obtain the appearance of out-of-state witnesses. This act has been passed in nearly every state. *Id.* at 723 n.4; *see* MISS. CODE ANN. §§ 99-9-27 to -35 (1972).

[191] *Cf.* 390 U.S. at 725.

3. Right to Cross-Examine Witness

A primary reason for the constitutional confrontation rule is to give the defendant in a criminal prosecution an opportunity to cross-examine the witnesses against him.[192] An adequate opportunity for cross-examination may satisfy the requirements of the confrontation clause even though physical confrontation at the trial does not take place because the witness is unavailable.[193]

The defendant is entitled to a complete cross-examination; the right of confrontation and cross-examination is not satisfied by a witness who submits to a token interrogation.[194] When a defendant is deprived of an opportunity to cross-examine a witness without fault on the defendant's part, such as when the witness becomes ill or dies after direct examination, the general rule is that the defendant may have the testimony previously given on direct examination excluded from the consideration of the jury.[195] Exclusion is also the proper remedy when the court removes a prosecution witness from the stand without giving the defendant an opportunity to cross-examine the witness,[196] or restricts cross-examination with respect to differences between the witness' recollection of actual events and a memorandum used to refresh his memory.[197] Exclusion is also proper when, during cross-examination of a witness, he claims the privilege against self-incrimination and by refusing to testify further denies the defendant his right to a full and complete cross-examination.[198] This is also the proper remedy when a witness who refuses to testify at all is read, under the guise of refreshing recollection, part of a confession which he made out of court implicating the defendant.[199]

The right to cross-examine witnesses adverse to the defendant is not limited to witnesses placed on the stand by the state.[200] In *Chambers v.*

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[192] Douglas v. Alabama, 380 U.S. 415, 418 (1965); Pointer v. Texas, 380 U.S. 400, 406-07 (1965); Ratcliff v. State, 308 So. 2d 225 (Miss. 1975); Myers v. State, 296 So. 2d 695, 700 (Miss. 1974); Stringer v. State, 279 So. 2d 156, 157 (Miss. 1973); *see* California v. Green, 399 U.S. 149, 158 (1970); Bruton v. United States, 391 U.S. 123, 126 (1968); *cf.* Spears v. State, 241 So. 2d 148 (Miss. 1970); Crapps v. State, 221 So. 2d 722, 723 (Miss. 1969).

[193] Barber v. Page, 390 U.S. 719, 722 (1968); Douglas v. Alabama, 380 U.S. 415, 418 (1965).

[194] Myers v. State, 296 So. 2d 695, 700 (Miss. 1974).

[195] *Id.*; Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969).

[196] Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969).

[197] Patrick v. State, 285 So. 2d 165, 167 (Miss. 1973).

[198] Myers v. State, 296 So. 2d 695, 700 (Miss. 1974).

[199] Douglas v. Alabama, 380 U.S. 415, 416-18 (1965).

[200] Chambers v. Mississippi, 410 U.S. 284, 297-98 (1973).

Mississippi[201] the United States Supreme Court held that the right includes cross-examination of any witness who gives damaging testimony against the accused even though that witness was called by the defense.[202]

In a joint trial of two or more defendants where one defendant's out-of-court confession implicates the other defendants and is properly introduced into evidence, the defendant who made the confession may exercise his privilege against self-incrimination and refuse to testify. While his confession is competent evidence against him it is inadmissible against his codefendants who are unable to cross-examine him.[203] Prior to *Bruton v. United States*,[204] the codefendants were entitled to have the jury instructed that although the confession could be considered against the confessor, it had to be disregarded when determining the guilt or innocence of the codefendants.[205] In *Bruton*, however, the United States Supreme Court decided that such a limiting instruction to the jury is not an adequate substitute for the codefendants' right to cross-examine the confessing defendant and that the effect of such an instruction is the same as no instruction at all.[206]

Failure to comply with the *Bruton* rule, however, does not automatically require reversal of the ensuing criminal conviction.[207] In cases where properly admitted evidence of guilt is overwhelming and the prejudicial effect of the violation is insignificant by comparison, the violation may be harmless error.[208] The situation in which the *Bruton* rule applies can be avoided by severing the trial of codefendants.

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[201] 410 U.S. 284 (1973).

[202] *Id.* at 297-98. In *Chambers* the Court held that Mississippi's "voucher" rule interfered with Chambers' right to defend against the State's charges. *Id.* at 298. The "voucher" rule provides that a party may not impeach his own witness. *Id.* at 295. This rule is based on the presumption, applicable to all cases in Mississippi, that a party who calls a witness "vouches for his credibility." *Id.*

[203] Bruton v. United States, 391 U.S. 123 (1968).

[204] 391 U.S. 123 (1968). The court noted:

> It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information. Nevertheless . . . there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . . Such a context is presented here . . . .

Id. at 135.

[205] This is the rule of Delli Paoli v. United States, 352 U.S. 232 (1957), which is expressly overruled by *Bruton*. 391 U.S. at 126.

[206] *Id.* at 137. The *Bruton* rule was held to be retroactive in Roberts v. Russell, 392 U.S. 293 (1968).

[207] Schneble v. Florida, 405 U.S. 427, 430 (1972).

[208] *Id.* See text accompanying notes 243 through 259 *infra*.

4. Scope of Cross-Examination Under the Right of Confrontation

The scope of cross-examination in Mississippi courts is "coextensive with the issues," and is not limited to matters raised on direct examination.[209] The defendant's right of cross-examination includes the right to fully cross-examine each adverse witness.[210] He may question each witness on all substantive issues and on all matters that would aid the trier of fact in evaluating the witness' credibility and the weight and worth of the witness' testimony.[211] The privilege of cross-examination should not be interfered with, hampered, or restricted by the trial judge except in a clear case of irrelevancy, trespass beyond admissible ground, or extremes of continual aimless repetition.[212] A defendant is entitled to know at the outset the witness' correct name and address.[213] A defendant can question a witness on collateral matters to determine his credibility as a witness, but it is within the sound discretion of the trial judge as to how far afield the testimony may go before it becomes irrelevant.[214] A defendant may cross-examine a witness with reference to the witness' recollection of what actually happened where the witness' recollection differed from his previous statement to the prosecution, a copy of which was given by the prosecutor to the witness to refresh his memory.[215] The scope of cross-examination does not extend to the asking of questions designed merely to embarrass or humiliate a witness.[216]

A witness may be examined as to his interest in the case on trial or as to his former convictions of crimes,[217] including misdemeanors,[218] but not including convictions of misdemeanor traffic offenses.[219] Refusal by

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[209] Prewitt v. State, 156 Miss. 731, 735, 126 So. 824, 825 (1930); Walton v. State, 87 Miss. 296, 303, 39 So. 689, 690 (1906).

[210] Myers v. State, 296 So. 2d 695, 700 (Miss. 1974); *see* Chambers v. Mississippi, 410 U.S. 284, 297-98 (1973).

[211] Myers v. State, 296 So. 2d 695, 700 (Miss. 1974); *cf.* Patrick v. State, 285 So. 2d 165, 167 (Miss. 1973).

[212] Patrick v. State, 285 So. 2d 165 (Miss. 1973); Prewitt v. State, 156 Miss. 731, 735, 126 So. 824, 825 (1930).

[213] Smith v. Illinois, 390 U.S. 129, 131 (1968).

[214] Shanklin v. State, 290 So. 2d 625 (Miss. 1974); Hankins v. State, 288 So. 2d 866 (Miss. 1974).

[215] Patrick v. State, 285 So. 2d 165 (Miss. 1973). See Mattox v. State, 243 Miss. 402, 139 So. 2d 653 (1962), for a discussion of procedures for discovering a witness' prior statement. See text accompanying notes 91 through 101 *supra*.

[216] Hankins v. State, 288 So. 2d 866 (Miss. 1974); Craft v. State, 271 So. 2d 735 (Miss. 1973).

[217] Haralson v. State, 314 So. 2d 722, 723 (Miss. 1975); Baker v. State, 307 So. 2d 545, 546 (Miss. 1975); Clanton v. State, 279 So. 2d 599 (Miss. 1973); Smith v. State, 217 Miss. 123, 63 So. 2d 557 (1953); MISS. CODE ANN. § 13-1-13 (1972).

[218] Baker v. State, 307 So. 2d 545, 546 (Miss. 1975).

[219] Clanton v. State, 279 So. 2d 599, 602 (Miss. 1973); Jones v. State, 268 So. 2d 348

the trial court to permit the defendant to ask a witness if he has ever been convicted of a crime or misdemeanor unduly restricts the right of the defendant to cross-examine the witness.[220] Even though the Mississippi Youth Court Law prevents the use of a juvenile delinquent's record in subsequent proceedings,[221] the right of a defendant to confront and cross-examine a juvenile accuser transcends the juvenile's statutory right to keep secret his related delinquent activities.[222] A witness cannot be questioned as to mere charges of the commission of offenses,[223] especially where such charges are pending and the witness' testimony may incriminate him.[224] Although this boundary of the scope of cross-examination is statutory, the statute merely codifies the witness' constitutional privilege against self-incrimination.[225] Moreover, the witness may not be asked, nor proof made, of the details of an alleged crime said to have been committed by the witness sought to be impeached.[226]

5. Waiver of Right of Confrontation

Every aspect of the right of confrontation must be asserted by the defendant in order for him to claim the constitutional protection.[227] The court will not intervene on the defendant's behalf and assert his constitutional privilege on the court's motion simply to avoid an unjust result.[228] A defendant may waive his right to be present at any and every stage of his trial by voluntarily absenting himself during his trial or by his own fault or misconduct.[229] Furthermore, he may lose his right to be

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(Miss. 1972); MISS. CODE ANN. § 63-9-15 (1972).

[220] Baker v. State, 307 So. 2d 545, 546 (Miss. 1975).

[221] MISS. CODE ANN. § 43-21-19 (1972).

[222] Davis v. Alaska, 415 U.S. 308, 319 (1974); Hamburg v. State, 248 So. 2d 430, 434 (Miss. 1971).

[223] Haralson v. State, 314 So. 2d 722, 723 (Miss. 1975); Statham v. Blaine, 234 Miss. 649, 107 So. 2d 93 (1958).

[224] MISS. CODE ANN. § 13-1-13 (1972) provides in relevant part: "A witness shall not be excused from answering any material and relevant question, unless the answer would expose him to criminal prosecution or penalty." *See* Haralson v. State, 314 So. 2d 722, 723 (Miss. 1975).

[225] *See* U.S. CONST. amend. V; MISS. CONST. art. 3, § 26.

[226] Haralson v. State, 314 So. 2d 722, 724 (Miss. 1975).

[227] See notes 136 through 159 and accompanying text *supra*.

[228] *See, e.g., In re* Wise, 291 So. 2d 727, 730 (Miss. 1974); Brewer v. State, 233 So. 2d 779, 782 (Miss. 1970). (Although certain admitted evidence violated the defendant's right of confrontation, where the defendant failed to object to that evidence, the court could only affirm the conviction.)

[229] Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Diaz v. United States, 223 U.S. 442 (1912); Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Thomas v. State, 117 Miss. 532, 78 So. 147 (1918); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911); MISS. CODE ANN. § 99-17-9 (1972).

present by such misconduct at trial that the judge is forced to remove him from the courtroom so that the trial may continue in an orderly manner.[230] However, where the absence of the defendant is due to his physical inability to attend his trial through no fault of his own, such as when he is too ill to attend, he cannot be said to have voluntarily absented himself and thus have waived his constitutional right to be present.[231]

A defendant may also waive his right to confront[232] and cross-examine[233] the witnesses against him. He may waive his right of confrontation: by express consent, such as by consenting to the reading of testimony or depositions taken elsewhere;[234] or by failure to assert the right at the proper time,[235] such as by making no mention or request for the personal appearance of a witness at trial,[236] or by not objecting to the admission of evidence in the trial court on the specific ground that the introduction of such evidence violated defendant's right of confrontation;[237] or by conduct inconsistent with a purpose to insist on the right of confrontation.[238]

The question of a waiver of a federally guaranteed constitutional right is a federal question controlled by federal law,[239] and there is a presumption against the waiver of constitutional rights.[240] For a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege."[241]

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[230] Illinois v. Allen, 397 U.S. 377, 343 (1970).

[231] Jones v. State, 204 Miss. 284, 286, 37 So. 2d 311 (1948); Corbin v. State, 99 Miss. 486, 492, 55 So. 43, 44 (1911).

[232] *In re* Wise, 291 So. 2d 727, 730-31 (Miss. 1974); Stringer v. State, 279 So. 2d 156, 158 (Miss. 1973); Brewer v. State, 233 So. 2d 779, 780 (Miss. 1970).

[233] Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969).

[234] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974); Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969).

[235] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974); Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969).

[236] *In re* Wise, 291 So. 2d 727, 730-31 (Miss. 1974).

[237] Stringer v. State, 279 So. 2d 156, 159 (Miss. 1973); Brewer v. State, 233 So. 2d 779, 782 (Miss. 1970).

[238] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974); Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969). For one interesting situation illustrating this method of waiver, see Brookhart v. Janis, 384 U.S. 1 (1966), where the question was whether the petitioner had voluntarily agreed to a prima facie trial and had thereby waived his right of cross-examination. In a prima facie trial, not available to a defendant in Mississippi, the defendant in essence agrees to plead guilty and not to cross-examine the prosecution's witnesses if the prosecution can put on a prima facie case.

[239] Brookhart v. Janis, 384 U.S. 1, 4 (1966).

[240] *Id.*; Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[241] Brookhart v. Janis, 384 U.S. 1, 4 (1966), *quoting* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Consequently, if a defendant's attorney enters a plea or takes other action that is inconsistent with his client's expressed desire, the attorney's actions do not waive the defendant's constitutional rights.[242] However, where the attorney's actions could be considered trial strategy and the defendant has expressed no inconsistent desire, the attorney's actions are deemed to waive the defendant's constitutional rights.[243] The trial court has never been held to have an obligation to inform the defendant that he may prevent his counsel from waiving his right of confrontation by expressing to the court his disapproval of his counsel's actions in this regard—apparently defendant's counsel is presumed to have advised him on this matter.

6. Applicability of the Harmless Error Rule

The right of confrontation guaranteed by the federal constitution was held to be subject to the "harmless error" rule in *Harrington v. California*.[244] The harmless error rule, applicable to violations of federal constitutional rights, was first stated in *Chapman v. California*.[245] This rule provides "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[246] In *Harrington*, the confessions of two nontestifying codefendants which implicated Harrington were introduced at trial in violation of the *Bruton* rule.[247] The Court affirmed Harrington's conviction, deciding first, without rationale, that a violation of the *Bruton* rule should be examined to determine if, from the facts in the case, the violation was harmless.[248] The majority then concluded that the untainted evidence against Harrington was so "overwhelming" that the conviction either had to stand or the *Bruton* rule had to be held not subject to the harmless error rule.[249]

In *Schneble v. Florida*[250] the Court reaffirmed that a violation of the *Bruton* rule, and presumably any other confrontation violation, is not

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[242] Brookhart v. Janis, 384 U.S. 1, 7 (1966).

[243] *See, e.g., In re* Wise, 291 So. 2d 727, 730 (Miss. 1974) (defendant was a minor); Stringer v. State, 279 So. 2d 156, 159 (Miss. 1973) (defendant was an attorney).

[244] 395 U.S. 250 (1969).

[245] 386 U.S. 18 (1967).

[246] *Id.* at 24.

[247] 395 U.S. 250 (1969). See text accompanying notes 203 through 208 *supra*.

[248] 395 U.S. at 252.

[249] *Id.* at 254. The majority was accused of having overruled *Chapman* by substitution of a weaker test, an "overwhelming" evidence test, for the minority's concept of "harmless" error which was that the error "must have made *no* contribution to a criminal conviction." *Id.* at 255 (Brennan, J., dissenting).

[250] 405 U.S. 427 (1972).

cause for automatic reversal of a criminal conviction.[251] The Court again held that if properly admitted evidence of guilt is "overwhelming" and the prejudicial effect of the constitutional violation is "insignificant by comparison," such that the error is "harmless beyond a reasonable doubt," the conviction will be affirmed.[252] The majority in *Schneble* elaborated on its standard stating that reversal is not required "unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction."[253]

Many years before *Harrington*, in *Lipscomb v. State*,[254] the Mississippi Supreme Court commented on the question of whether or not a violation of the confrontation clause of section 26 of the Mississippi Constitution would be harmless error. The *Lipscomb* court said in dicta that such error could be harmless[255] but laid down no criteria for determining when an error would be held harmless. Since *Chapman*, the Mississippi Supreme Court has addressed the question of harmless error in the context of a violation of the confrontation clause once, and then only in passing. In *Prestage v. State*,[256] the appellant contended that he had been denied the right to examine an adverse witness when a laboratory report prepared by a nontestifying party was admitted into evidence over his general objection. The court did not mention the confrontation clause and did not rule on the question of whether or not admission of the report was error. The court said simply that even without the laboratory report the crime had been proved conclusively, beyond a reasonable doubt, and that the error, if any, was harmless under the *Chapman* test.[257]

The Mississippi Supreme Court has never cited *Harrington* or *Schneble*, and consequently has never expressly adopted the "relaxed" evidentiary standard of *Schneble*.[258] The Mississippi court may not construe the federal confrontation clause against the state more strictly than the United States Supreme Court has done,[259] but it could construe

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[251] *Id.* at 430; *accord*, Brown v. United States, 411 U.S. 223, 231 (1973).

[252] 405 U.S. at 430.

[253] *Id.* at 432. This standard is much less restrictive than the "*no* contribution" standard desired by the minority in *Harrington*. See note 234 *supra*.

[254] 76 Miss. 223, 25 So. 158 (1899).

[255] *Id.* at 244, 25 So. at 161.

[256] 257 So. 2d 882 (Miss. 1972).

[257] *Id.* at 884.

[258] See text accompanying note 237 *supra*.

[259] *See* Oregon v. Hass, 420 U.S. 714 (1975).

> [A] State is free *as a matter of its own law* to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards. But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court specifically

the confrontation clause of section 26 of the Mississippi Constitution more strictly than the federal confrontation clause if it chose to do so.[260]

7. The Informant's Privilege

The "informant's privilege"[261] is the state's privilege to conceal the identity of persons who furnish police officers with information that aids them in obtaining evidence against the accused.[262] The privilege serves the public interest by encouraging citizens to furnish knowledge of crimes to the police without exposing them to the risk of criminal or civil retaliation.[263] The privilege is properly invoked by the state where the informant assists the police in acquiring evidence, but is not called to testify at the trial.

In the traditional sense of the right of confrontation, no violation occurs unless the prosecution's witnesses attempt to repeat in court information communicated to them by the nontestifying informer. However, the informer may possess information vital to an effective defense and the prosecution may have failed to produce the informant for any of several reasons favorable to the defense. Examples of such reasons are that the informant might testify to entrapment by police officers, or that the informant might not be able to identify the defendant, or that the informant was a fictitious creation of police and prosecutorial overzealousness.[264] Viewed from this perspective, the withholding of the informant's identity by the prosecution constitutes suppression of evidence vital to the defense. On the other hand, identification of all informants would result in a drastic decrease in information received by the police from the public. The informant's privilege therefore is the product of judicial balancing.[265]

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refrains from imposing them.

Id. at 719 (emphasis in original) (footnote & citations omitted).

[260] *Id.*

[261] *See* McCormick v. State, 279 So. 2d 596 (Miss. 1973), where the court recognized the privilege of law enforcement officers to withhold the name of an informant whose information had assisted them in obtaining evidence against the accused. The court's rationale was that

> [p]ublic interest requires that informants ought to be encouraged to transmit information about crime to law officers . . . . Informers would not be useful to the state if state officials and/or prosecuting witnesses should be required to identify informers and thereby expose the informer to possible harm by physical violence or to cause him to run the risk of suits being filed against him for defamation or malicious prosecution.

Id. at 599; *quoted in* Ward v. State, 293 So. 2d 419, 420 (Miss. 1974).

[262] Sims v. State, 313 So. 2d 27, 30-31 (Miss. 1975) (Walker, J., specially concurring).

[263] *Id.*

[264] *See id.* at 30.

[265] Roviaro v. United States, 353 U.S. 53, 62 (1957).

In addition to being a member of the general public, an informer may be a state or federal undercover agent or may be compensated for the information and still come within the informant privilege.[266] In Mississippi disclosure of the identity of an informer who is not a material witness to the guilt or innocence of the defendant is within the sound discretion of the court.[267] However, where the informer is an actual participant in the alleged crime[268] or is present and is an eyewitness to the criminal act, and where the revelation of the informer's identity is essential to a fair determination of the case, the state must reveal the informer's identity when requested to do so by the defendant.[269] The decisive distinction to be drawn under the present rule, therefore, is one between persons who are merely informers and persons whose activity or knowledge makes them witnesses or participants to the crime for which the defendant is on trial.[270]

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[266] Lewis v. United States, 385 U.S. 206, 209 (1966).

[267] Mills v. State, 304 So. 2d 651, 654 (Miss. 1974); Young v. State, 245 So. 2d 26, 27 (Miss. 1971); Strode v. State, 231 So. 2d 779 (Miss. 1970); *see* McCray v. Illinois, 386 U.S. 300 (1967), *quoting* Roviaro v. United States, 353 U.S. 53 (1957), where the Court held that when

> "the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the [informant] privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action. . . .
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> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

386 U.S. at 310 (footnotes & citations omitted).

[268] Roviaro v. United States, 353 U.S. 53 (1957); Sims v. State, 313 So. 2d 27, 30 (Miss. 1975); Hemphill v. State, 313 So. 2d 25 (Miss. 1975); Mills v. State, 304 So. 2d 651, 654 (Miss. 1974); Young v. State, 245 So. 2d 26, 27 (Miss. 1971).

[269] Ward v. State, 293 So. 2d 419, 421 (Miss. 1974); *see* Sims v. State, 313 So. 2d 27, 30 (Miss. 1975). Sims' defense was an alibi and revelation of the informer's identity was held to be essential to a fair determination of the case because Sims was entitled to a fair chance to prove that (1) the informer would not identify Sims as the person who made the sale, or (2) the informer would not testify that Sims was the person involved, or (3) no such person as the alleged informer could be produced. *Id.* at 30.

[270] Sims v. State, 313 So. 2d 27, 30 (Miss. 1975) (Rodgers, J., concurring); Hardy v. State, 313 So. 2d 26, 27 (Miss. 1975). Presiding Justice Rodgers of the Mississippi Supreme Court suggests that the test should be:

> If a reliable informer tells the officers: "If you go yonder you will find" a certain crime or evidence of a certain crime, the identity of the informer may

III. Juvenile Certification and Delinquency Adjudication Proceedings

A. Due Process and the Mississippi Youth Courts

The statutory basis for judicial proceedings involving juveniles in Mississippi is the Youth Court Law of 1946.[271] The law includes *inter alia*: a statutory definition of the term "delinquent child";[272] the basic requirements that must be met by a petition charging that a child should be adjudicated a delinquent;[273] service of process and notice requirements;[274] assignment of original jurisdiction for various offenses charged against the minor;[275] provisions for pre-hearing custody of the child;[276] provisions for transfer of jurisdiction to the youth court,[277] and,

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be withheld. On the other hand, if a reliable informer tells the officers: "Come with me and I will help you apprehend the criminal" and takes part in the activity of the police, or the informer becomes a witness to the facts constituting the crime, he becomes a witness whose presence at the trial may be required by the defendant as a constitutional right to be "confronted with the witnesses against him." U.S. Const. Amend. VI; Miss. Const. § 26.

Sims v. State, 313 So. 2d 27, 30 (Miss. 1975) (Rodgers, J., concurring). *But see id.* at 31 where Justice Walker states:

> [I]n my opinion, it is not necessary *in every case* where the informant is an eyewitness to the illegal transaction to require that his identity be revealed. Roviaro v. United States . . . does not go that far.

Id. (Walker, J., specially concurring) (emphasis in original).

[271] Miss. Code Ann. §§ 43-21-1 to -55 (1972 & Supp. 1975). For a detailed history of the Youth Court Law of 1946 and prior youth court acts, and a determination of the general constitutionality of the Youth Court Law of 1946, see Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952). For an overview of the Mississippi youth court system, including training school facilities, see Joyner & Maxey, *Juvenile Offenses: A Study of Adjudication and Disposition in Mississippi*, 42 Miss. L.J. 60 (1971). For a discussion of Mississippi youth court practices before *In re* Gault, 387 U.S. 1 (1967), *see* 39 Miss. L.J. 121 (1967). *See also* Comment, *A Recommendation for Court-Appointed Counsel in Child-Abuse Proceedings*, 46 Miss. L.J. 1072 (1975).

Miss. Code Ann. §§ 43-23-1 to -55 (1972), passed in 1964, established the Harrison County Family Court which has jurisdiction over children in that county to the same extent that the Youth Court has jurisdiction in other Mississippi counties. The statutes of chapter 23, title 43, are not identical to those of chapter 21, title 43, since the former does not reflect the 1973 amendments made to certain statutes in chapter 21. However, the differences, for the most part, are immaterial and the discussion in this comment of provisions of the Youth Court Law is also applicable to the corresponding provisions of the Family Court Law.

[272] Miss. Code Ann. § 43-21-5(g) (1972).

[273] *Id.* § 43-21-11 (Supp. 1975).

[274] *Id.* § 43-21-13 (1972).

[275] *Id.* §§ 43-21-7 (1972), -31, (Supp. 1975).

[276] *Id.* § 43-21-13 (1972).

[277] *Id.* § 43-21-33 (Supp. 1975).

after full investigation where a felony is charged, for transfer of the youth from the youth court to the proper adult court for further criminal proceedings;[278] provisions for an adjudicatory hearing on the question of delinquency;[279] dispositional alternatives available to the youth court judge upon an adjudication that the minor is delinquent;[280] a provision for retained jurisdiction by the youth court over previously adjudicated delinquents until age 20;[281] the right of appeal;[282] and a statement of the social and humanitarian purposes of the Youth Court Law.[283]

Much of the work of the youth court is carried on informally, and most delinquent children are rehabilitated without the necessity of a petition and an adjudicatory hearing.[284] However, when a petition is filed, the child and his parents, guardians, or custodians must be afforded due process in any adjudicatory hearing.[285] When a petition is filed charging that a child is delinquent, an adjudication of delinquency may have as a consequence commitment to a state training school.[286] A proceeding in which a finding of delinquency could result in a child's being deprived of his liberty for several years is comparable in nature to a felony prosecution.[287] Consequently, while an adjudicatory hearing may not be statutorily criminal, it is quasi-criminal.[288] If a petition filed against a child of age 13 or older charges him with commission of an offense that would be a felony if committed by an adult, the child may, after "full investigation," be certified to an adult court for criminal prosecution.[289] Clearly, the consequences of the certification investigation are of critical importance to the child because those consequences may be that the child will be deprived of the special protections and provisions of the Youth Court Law and subjected to an actual felony prosecution.[290]

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[278] *Id.* § 43-21-31 (1972).

[279] *Id.* § 43-21-17 (Supp. 1975).

[280] *Id.* § 43-21-19 (1972).

[281] *Id.* § 43-21-9.

[282] *Id.* § 43-21-51.

[283] *Id.* § 43-21-55 provides:

> This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive such care, guidance and control, preferably in his own home, as will conduce to the child's welfare and the best interest of the state, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them.

[284] *In re* Dennis, 291 So. 2d 731, 734-35 (Miss. 1974).

[285] 291 So. 2d at 735; MISS. CODE ANN. § 43-21-17 (Supp. 1975).

[286] MISS. CODE ANN. § 43-21-19 (1972).

[287] *In re* Gault, 387 U.S. 1, 36 (1967).

[288] Monk v. State, 238 Miss. 658, 660, 116 So. 2d 810, 811 (1960).

[289] MISS. CODE ANN. § 43-21-31 (1972).

[290] Kent v. United States, 383 U.S. 541, 553 (1966).

In recognition of the failure of the youth court systems of many jurisdictions to provide juveniles with "the essentials of due process and fair treatment,"[291] the United States Supreme Court in the past 10 years has handed down five major decisions that define minimal standards of due process that must be accorded children in these quasi-criminal proceedings. The decisions of *Kent v. United States*[292] and *Breed v. Jones*[293] are applicable to certification hearings. *In re Gault*,[294] *In re Winship*,[295] and *McKeiver v. Pennsylvania*[296] affect delinquency adjudicatory hearings. To some extent these decisions parallel earlier decisions of the Mississippi Supreme Court[297] and to some extent they place new requirements on the Mississippi youth court system. The impact of these and subsequent holdings of the Mississippi Court are summarized in the following sections.

1. Original Jurisdiction

In general, the youth court[298] has sole original jurisdiction in all proceedings concerning delinquent children,[299] with a "child" being defined as a person less than 18 years of age.[300] Statutory provision is made requiring the transfer to the youth court of the case of any child brought before a justice of the peace court or a municipal court and charged with the commission of a crime under a state law or municipal ordinance, unless prosecution is permitted by order of the youth court.[301] Such cases

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[291] *In re* Gault, 387 U.S. 1, 30 (1967), *quoting* Kent v. United States, 383 U.S. 541, 562 (1966). As Mr. Justice Fortas noted in *Gault*: "Under our Constitution, the condition of being a boy does not justify a kangaroo court." 387 U.S. at 28.

[292] 383 U.S. 541 (1966).

[293] 421 U.S. 519 (1975), *noted in* 46 MISS. L.J. 1096 (1975).

[294] 387 U.S. 1 (1967).

[295] 397 U.S. 358 (1970).

[296] 403 U.S. 528 (1971).

[297] *E.g., In re* Slay, 245 Miss. 294, 147 So. 2d 299 (1962); Sharp v. State, 240 Miss. 629, 127 So. 2d 865, *suggestion of error overruled*, 240 Miss. 646, 129 So. 2d 637 (1961); Monk v. State, 238 Miss. 658, 116 So. 2d 810 (1960); Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952); Britt v. Allred, 199 Miss. 786, 25 So. 2d 711 (1946); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931).

[298] MISS. CODE ANN. § 43-21-3 (1972) provides for the creation of a youth court division of the county court, or in counties where there is no county court, a youth court division of the chancery court.

[299] *Id.* § 43-21-7.

[300] *Id.* § 43-21-5.

[301] *Id.* § 43-21-33 (Supp. 1975). If the youth court permits a child to be prosecuted for a misdemeanor in a justice court or municipal court, and the child is convicted and sentenced, the youth court has full power to stay the execution of the sentence and release the child on good behavior or under such conditions as the youth court deems appropriate. *Id.*

transferred to the youth court will be dealt with there as cases of delinquency.[302] A child under 13 may not be prosecuted criminally for a misdemeanor or felony; such cases must be handled by the youth court.[303]

There are two exceptions to the general vesting in the youth court of original jurisdiction in matters involving a child: (1) when the child is charged with a traffic violation, the justice of the peace court or municipal court having jurisdiction of the matter may dispose of it in the same manner as for other offenders and transfer of the case to the youth court is not necessary;[304] (2) if the child is charged with a felony punishable by life imprisonment or death, the circuit court has exclusive jurisdiction of the child.[305] However, if the child is tried in the circuit court on a felony charge for which the circuit court has original jurisdiction and the child is acquitted or the jurisdiction-vesting charge is dismissed, the jurisdiction of the circuit court ends and the youth court has jurisdiction of any subsequent charges against the child.[306]

If a child of age 13 or older is charged with a crime that would be a felony if committed by an adult but which is not punishable by life imprisonment or death, the youth court, after a full investigation and hearing in accordance with due process,[307] may in its discretion either retain jurisdiction and proceed with the case as a delinquency case or certify the child for criminal prosecution in the court that would try the offense if an adult had committed it.[308] The adult criminal court gains

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[302] *Id.*

[303] *Id.* § 43-21-35 (1972).

[304] *Id.* § 43-21-33 (Supp. 1975). However, if the child is a habitual offender, the youth court may, of its own motion, take jurisdiction of the traffic case and proceed with it as a case of delinquency. *Id.*

[305] Butler v. State, 217 So. 2d 525 (Miss. 1969); MISS. CODE ANN. § 43-21-31 (1972). In Jackson v. State, 311 So. 2d 658 (Miss. 1975), Jackson, a youth, contended that this statute was unconstitutional because the decision to try him for murder, vesting original jurisdiction in the circuit court instead of in the youth court, was made by the prosecutor without first holding a hearing. The Mississippi Supreme Court held the statute constitutional. The court said that the controlling principle is the concept of separation of powers; the district attorney is an officer of the executive department, whereas a judge is a judicial officer. Due process may require a hearing before a decision is made by a judicial officer, but the same is not necessarily true of a decision made by a prosecutor in his exercise of prosecutorial discretion. The elements of each decision are different and separate. The prosecutor must decide from the facts available to him what charge to bring. If that charge then requires a jurisdictional decision by the youth court judge, such decision must have all the trappings of due process. *Id.* at 661-62.

[306] Grant v. State, 305 So. 2d 351, 352 (Miss. 1974); *cf.* Walker v. State, 235 So. 2d 714, 715-16 (Miss. 1970).

[307] Hopkins v. State, 209 So. 2d 841, 843-44 (Miss. 1968), *citing* Kent v. United States, 383 U.S. 541, 552-53, 561 (1966); *see* Jackson v. State, 311 So. 2d 658, 662 (Miss. 1975).

[308] Hammons v. State, 291 So. 2d 177 (Miss. 1974); MISS. CODE ANN. § 43-21-31

jurisdiction to try the child in these cases only upon proper certification by the youth court; in the absence of such certification, a conviction in the adult court is void.[309]

The time at which the trial court's jurisdiction is determined is the date of the trial.[310] If the defendant is age 18 or older at the time of the certification hearing or at the time of the adjudicatory hearing, the youth court has no original jurisdiction over the defendant.[311] Similarly, if the defendant is less than 18 years of age at the time of his trial in an adult criminal court, that court has no jurisdiction over the defendant unless jurisdiction is conferred by order of the youth court or is exclusive as provided by statute.[312]

2. Necessity and Sufficiency of a Petition Alleging Delinquency

a. Necessity of a Petition

In a youth court proceeding concerning the interest of a child, whether or not a petition has been filed alleging that the youth is a "delinquent child"[313] is critical to the nature and formality of the hearing and also to the alternative dispositions open to the judge. The court

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(1972). Certification (waiver of jurisdiction) hearings have been the subject of recent treatment by the United States Supreme Court. See text accompanying notes 336 through 357 *infra*.

[309] Hammons v. State, 291 So. 2d 177 (Miss. 1974); Butler v. State, 217 So. 2d 525, 525-26 (Miss. 1969); Lee v. State, 214 Miss. 740, 741, 59 So. 2d 338, 338-39 (1952); Wheeler v. Shoemake, 213 Miss. 374, 415, 57 So. 2d 267, 286 (1952). However, it is not necessary that the certification order be filed in the circuit court prior to trial. Hammons v. State, 291 So. 2d 177 (Miss. 1974).

[310] Wheeler v. Shoemake, 213 Miss. 374, 415, 57 So. 2d 267, 286 (1952).

[311] "The Youth Court has no jurisdiction over any young person eighteen (18) years of age for any cause . . . unless the child is being held under an order [of the youth court] made prior to his eighteenth (18th) birthday . . . ." Smith v. State, 229 So. 2d 551, 557 (Miss. 1969); *see* Wheeler v. Shoemake, 213 Miss. 374, 415, 57 So. 2d 267, 286 (1952).

[312] Hammons v. State, 291 So. 2d 177 (Miss. 1974); *see* Butler v. State, 217 So. 2d 525, 525-26 (Miss. 1969); Lee v. State, 214 Miss. 740, 741, 59 So. 2d 338, 338-39 (1952); Wheeler v. Shoemake, 213 Miss. 374, 415, 47 So. 2d 267, 286 (1952).

[313] MISS. CODE ANN. § 43-21-5(g) (1972) provides that a

> "[d]elinquent child" is synonymous with the meaning of what is commonly called a juvenile offender, and means any child not less than ten years of age whose occupation, behavior, environment or associations are injurious to his welfare or the welfare of other children; or who deserts his home; or who is habitually disobedient to or beyond the control of his parents, guardian or custodian; or who being required to attend school wilfully violates rules thereof, or wilfully absents himself therefrom; or who violates any state law or municipal ordinance; or who, by reasons of being habitually wayward or habitually disobedient, becomes an incorrigible or uncontrollable child; or who so deports himself as to injure or endanger the morals or health of himself or any other person.

may make an informal adjustment of the child's situation for the best interest of the child with or without a petition,[314] but the court may not permanently take the child from the custody of its natural parents or the child's legal custodian unless a hearing is held on a petition that complies with the requirements of the Youth Court Law.[315] Consequently, unless a petition has been filed the court is restricted in the remedial alternatives available to it.[316] However, when a petition is filed praying that the child be adjudged delinquent, the possibility becomes real that the child may be committed to a state training school,[317] and the child and his parents, guardians, or custodians must be afforded due process in any adjudicatory hearing on the petition.[318] A child may not be committed to a state institution without a petition and an adjudicatory hearing.[319]

b. Sufficiency of a Petition

Section 43-21-11 requires that the petition set forth the facts that bring the child within the jurisdiction of the youth court. These facts include: the name, age, sex, race, and residence of the child; the name and residence of his parents, guardian, or custodian; and the facts which bring the child within the purview of the Youth Court Law.[320]

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[314] *Id.* § 43-21-11 (Supp. 1975).

[315] *Id.* The 1973 amendment to this statute is substantially more inclusive than the prior statute. Whereas the 1973 amendment provides that "no child may be permanently taken from the custody of its natural parent or [legal custodian] except by hearing upon a petition," *id.*, the previous statute, passed in 1966, provided only that "no child may be committed to any institution or agency except by hearing upon a petition . . . ." *Id.* § 43-21-11 (1972).

[316] *See In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974).

[317] MISS. CODE ANN. § 43-21-19 (1972) provides in applicable part:

> If the court finds that the child is neglected or delinquent or battered within the provisions of this chapter, it shall so adjudge and decree, and may, by order duly entered, proceed as follows: . . . if adjudged delinquent, may commit the child to the custody of a state-supported training school.

[318] *In re* Dennis, 291 So. 2d 731, 735 (Miss. 1974); MISS. CODE ANN. § 43-21-17 (Supp. 1975).

[319] *In re* Dudley, 310 So. 2d 919, 920 (Miss. 1975); *In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974); *In re* Slay, 245 Miss. 294, 298, 147 So. 2d 299, 300 (1962); Sharp v. State, 240 Miss. 629, 636, 127 So. 2d 865, 868, *suggestion of error overruled*, 240 Miss. 646, 129 So. 2d 637, 638 (1961). In response to the suggestion of error the Mississippi Supreme Court said in *Sharp*:

> We do hold that the doctrine [of *parens patriae*] does not authorize the State to confine a minor to an institution . . . except by hearing on a petition filed in accordance with the act, an order setting the same for hearing, and process upon the minor.

240 Miss. at 646, 129 So. 2d at 638.

[320] MISS. CODE ANN. § 43-21-11 (Supp. 1975).

The adequacy of the statement of facts that brings the child within the purview of the Youth Court Law is a problem area that has been addressed by the Mississippi Supreme Court on a number of recent occasions.[321] In 1961, in *Sharp v. State*,[322] the court attempted to clarify the statutory requirement that the petition set forth "the facts which bring the child within the purview"[323] of the law saying that this requirement means that the petition must state facts that if proved would justify an adjudication of delinquency.[324] In the 1962 case of *In re Slay*,[325] the court found that the petition was faulty because it "alleged a conclusion and not facts on which to base the assertion" that the child was within the purview of the statute.[326] In the post-*Gault* case of *In re Gressett*,[327] the court noted that the Federal Constitution also required that notice be given a minor of the charges against him.[328] More recently in *In re Dennis*,[329] the court reaffirmed this position and required that the petition must allege enough specific and definite facts to give notice of the particular misconduct or circumstances that are to be inquired into at the adjudicatory hearing.[330] The court also noted that where a charge of delinquency is based upon a criminal act, the petition must

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[321] *In re* Dudley, 310 So. 2d 919, 920 (Miss. 1975); *In re* Earles, 294 So. 2d 171 (Miss. 1974); *In re* Dollar, 293 So. 2d 458 (Miss. 1974); *In re* Triplett, 292 So. 2d 171 (Miss. 1974); *In re* Dennis, 291 So. 2d 731, 733 (Miss. 1974); *In re* Jenkins, 274 So. 2d 143 (Miss. 1973); *In re* Long, 184 So. 2d 861, 862 (Miss. 1966); *In re* Slay, 245 Miss. 294, 298, 147 So. 2d 299, 300-01 (1962); Sharp v. State, 240 Miss. 629, 635-36, 127 So. 2d 865, 867-68, *suggestion of error overruled*, 240 Miss. 646, 129 So. 2d 637 (1961).

[322] 240 Miss. 629, 127 So. 2d 865, *suggestion of error overruled*, 240 Miss. 646, 129 So. 2d 637 (1961).

[323] MISS. CODE ANN. § 43-21-11 (Supp. 1975).

[324] 240 Miss. at 636, 127 So. 2d at 868. In *Sharp*, the petition simply alleged that Sharp

> is a juvenile delinquent, fast becoming uncontrollable by his parents, and that he is violating the laws of the State of Mississippi in various ways. . . . The petition does not charge that the child has violated any particular state law or municipal ordinance, and no facts are alleged to indicate the nature of the charges intended to be proved or the laws or ordinances which he is accused of violating.

Id. at 635, 127 So. 2d at 867.

[325] 245 Miss. 294, 147 So. 2d 299 (1962).

[326] *Id.* at 298, 147 So. 2d at 301. In *In re* Long, 184 So. 2d 861 (Miss. 1966), the court said that a petition alleging "that said child has been charged as [a] delinquent-neglected child" did not bring the child within the purview of the Youth Court Law. *Id.* at 862.

[327] 272 So. 2d 921 (Miss. 1973).

[328] *Id.* at 922, *citing In re* Gault, 387 U.S. 1 (1967). *Gault* notes that "[n]otice to comply with due process requirements . . . must 'set forth the alleged misconduct with particularity.'" 387 U.S. at 33; *see In re* Dennis, 291 So. 2d 731, 733 (Miss. 1974).

[329] 291 So. 2d 731 (Miss. 1974).

[330] *Id.* at 733.

charge commission of the offense with the same particularity as a criminal indictment.[331] A petition will not support a finding of delinquency if it fails by the omission of necessary allegations sufficiently to inform the minor and his parents of the facts which if proven will justify an adjudication of delinquency.[332] This is analogous to a complaint that fails to state a cause of action, or to an indictment that fails to charge the essential facts that constitute a crime.

3. Notice and Service of Process

a. Order Fixing Date and Place of Hearing

When a petition is filed, the youth court judge may order that a preliminary social investigation be made by a public agency and presented to the court.[333] The judge must then enter an order fixing a date and designating a place for the hearing on the petition.[334] The statutory requirement that the judge enter an order fixing a date and setting a place for the hearing is a critical element of due process of law and must be complied with in order for the jurisdiction of the court to attach.[335]

b. Service of Process on the Child

Another critical element of due process is that service of a summons to attend the hearing must be made personally upon the child.[336] The

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[331] *E.g., id.* at 733, *cited in In re* Dudley, 310 So. 2d 919, 920 (Miss. 1975); *In re* Earles, 294 So. 2d 171 (Miss. 1974); *In re* Dollar, 293 So. 2d 458 (Miss. 1974). In *In re* Jenkins, 274 So. 2d 143 (Miss. 1973), the court said that the petition charging the child with burglary should have alleged the ownership of the premises allegedly burglarized or the name of the person entitled to possession of the property allegedly entered.

In *In re* Triplett, 292 So. 2d 171 (Miss. 1974), a petition which alleged that minors "were involved in an assault and battery on school officials and others," and which contained similar indefinite allegations, was held wholly insufficient to invoke the limited jurisdiction of the youth court.

[332] *See In re* Earles, 294 So. 2d 171 (Miss. 1974).

[333] MISS. CODE ANN. §§ 43-21-11 (Supp. 1975), -13 (1972).

[334] Sharp v. State, 240 Miss. 629, 638, 127 So. 2d 865, 869 (1961); MISS. CODE ANN. § 43-21-13 (1972).

[335] *In re* Edwards, 298 So. 2d 703 (Miss. 1974); *In re* Slay, 245 Miss. 294, 300, 147 So. 2d 299, 302 (1962); Sharp v. State, 240 Miss. 629, 638-41, 127 So. 2d 865, 869-70 (1961), *suggestion of error overruled*, 240 Miss. 646, 129 So. 2d 637, 638 (1961); *cf.* Monk v. State, 238 Miss. 658, 660, 116 So. 2d 810, 811 (1960); Sinquefield v. Valentine, 159 Miss. 144, 152, 132 So. 81, 83 (1931). In *Sharp*, on suggestion of error, the court said:

> We do hold that the doctrine [of *parens patriae*] does not authorize the State to confine a minor in an institution . . . except by hearing on a petition filed in accordance with the act, an order setting the same for hearing, and process upon the minor.

240 Miss. at 646, 129 So. 2d at 638.

[336] MISS. CODE ANN. § 43-21-13 (1972).

statute provides that the minor may waive service of summons by a voluntary appearance and hence confer jurisdiction upon the court,[337] but in *Sharp v. State*[338] this provision of the statute was expressly ruled invalid.[339] The Mississippi Supreme Court said in *Sharp* that the legislature did not have power to dispense with personal service of process on the minor, nor could the minor validly waive service of process upon himself.[340] This holding, that the minor must be personally served, has since been reaffirmed on several occasions.[341]

c. Service of Process on Parents, Guardians, and Custodians

A summons is also required by statute to be served upon the person having custody or control of the child.[342] If the person having custody or control of the child is not one of the child's parents or the child's guardian, then summons must also be served upon one of the parents or the guardian if such person is a resident of Mississippi and can be located within the state.[343] If neither a parent, guardian, nor custodian resides within the state or cannot be located within the state, the clerk of the youth court must mail a written notice, by registered mail, to a parent, guardian, or custodian if the name and address of such a person can be ascertained.[344] The written notice must advise the recipient of the time and place of the hearing, and it must be mailed not less than 10 days before the date set for the hearing.[345] The clerk must note the fact and time of the mailing on the youth court docket.[346] If no appearance is made in response to the mailed notice, then the court may take jurisdiction of the child 10 days after the mailing of the notice just as though summons had been personally served on the addressee.[347] This provision of the statute does not comply with constitutional due process since the notice is not required to contain a statement of the charges brought against the child. In *Gault*, the United States Supreme Court stated that in order to meet constitutional due process standards,

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[337] *Id.*

[338] 240 Miss. 629, 127 So. 2d 865, *suggestion of error overruled*, 240 Miss. 646, 129 So. 2d 637 (1961).

[339] 240 Miss. at 641-42, 127 So. 2d at 870-71.

[340] *Id.* at 641, 127 So. 2d at 870.

[341] *In re* Edwards, 298 So. 2d 703 (Miss. 1974); Sharp v. State, 240 Miss. 646, 129 So. 2d 637, 638 (1961); *accord, In re* Gault, 387 U.S. 1, 33 (1967).

[342] MISS. CODE ANN. § 43-21-13 (1972).

[343] *Id.*

[344] *Id.*

[345] *Id.*

[346] *Id.*

[347] *Id.*

notice must give the child and his parents or guardians a reasonable opportunity to prepare to meet the charges, and the notice given must state the misconduct charged with enough particularity to be deemed constitutionally adequate in a civil or criminal proceeding.[348]

Although a copy of the petition is not required to be served with the summons where personal service of process is made, a person so served usually has easy access to the filed petition. However, to meet the requirements of due process the written notice served by mail should have attached to it a copy of the petition, because the short period of time left for the parent or guardian to respond after receiving the mailed notice cannot be effectively utilized until after the parent is informed of the actual nature of the charge.

The youth court is without jurisdiction unless the parents or guardian, if available, are summoned as required by the Youth Court Law.[349] However, a parent or guardian, or the custodian of the child if the parent or guardian cannot be found, may waive service of process by voluntarily appearing in court without having been properly served. If such parent, guardian, or custodian appears and makes no objection to improper service or lack of service, the court may proceed with full jurisdiction over the case as though the parent, guardian, or custodian had been served.[350] It is reemphasized that although the parent, guardian, or custodian can waive service of process, the youth cannot waive personal service of process.[351]

d. Requirement of Timely Service

The statute requires that the summons shall be served on the youth and on his parents, guardian, or custodian "not less than three days before the date set for the hearing . . . ."[352] The Mississippi Supreme Court has interpreted this requirement literally, requiring that for compliance with due process, three *full* days must pass *between* the date of the last service of process and the date of the hearing.[353]

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[348] 387 U.S. at 33.

[349] *In re* Edwards, 298 So. 2d 703 (Miss. 1974); Hopkins v. Youth Court, 227 So. 2d 282, 284 (Miss. 1969); Sharp v. State, 240 Miss. 629, 639, 127 So. 2d 865, 869 (1961); *cf.* Britt v. Allred, 199 Miss. 786, 789, 25 So. 2d 711, 712 (1946); Sinquefield v. Valentine, 159 Miss. 144, 149, 132 So. 81, 82 (1931).

[350] MISS. CODE ANN. § 43-21-13 (1972).

[351] *In re* Edwards, 298 So. 2d 703 (Miss. 1974).

[352] MISS. CODE ANN. § 43-21-13 (1972).

[353] In *In re* Long, 184 So. 2d 861, 862 (Miss. 1966), the court held that service on June 29 providing notice of a hearing on July 2 did not satisfy the 3-day requirement.

In *In re* Slay, 245 Miss. 294, 299, 147 So. 2d 299, 301 (1962), the court held that service on June 8 providing notice of a hearing on June 11 did not satisfy the 3-day requirement.

4. The Certification (Waiver of Jurisdiction) Hearing

If a child of age 13 or more is charged with an offense that would be a felony if committed by an adult, the youth court may, after full investigation, retain jurisdiction and proceed with the case as a delinquency case, or waive jurisdiction after a certification hearing and certify the child to the proper adult court for criminal proceedings.[354] The statute provides no rules of conduct for the certification hearing and no guidelines for the decision of whether or not the youth court should certify the child for criminal prosecution.[355] The statute only requires that a full investigation be made, and it allows the youth court to decide "in its discretion"[356] whether or not to certify the youth.

Although the statute contemplates that the youth court shall have broad discretion in its determination of the certification question, this breadth is not unlimited.[357] The statute does not confer upon the youth court a license for arbitrary procedure nor does it permit the youth court to determine in isolation the answer to the certification question.[358] A child must be given a hearing before the entry of a certification order,[359] and "the hearing must measure up to the essentials of due process and fair treatment."[360] Factors set forth in the Appendix to *Kent v. United States*[361] were recommended to Mississippi youth court judges by the Mississippi Supreme Court in *Hopkins v. State*[362] for their consideration in reaching their decisions in certification hearings.[363]

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[354] Hammons v. State, 291 So. 2d 177, 179 (Miss. 1974); Gatlin v. State, 207 Miss. 588, 593-94, 42 So. 2d 774, 775 (1949); MISS. CODE ANN. § 43-21-31 (1972).

[355] *See* MISS. CODE ANN. § 43-21-31 (1972).

[356] *Id.*

[357] In Hopkins v. State, 209 So. 2d 841, 843 (Miss. 1968), *quoting* Kent v. United States, 383 U.S. 541, 552-53 (1966), the court said of the certification proceeding that

> *it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation."*

209 So. 2d at 843, *quoting* 383 U.S. at 553 (emphasis added by Mississippi Supreme Court).

[358] *Id.*

[359] *Id.*

[360] *In re* Gault, 387 U.S. 1, 30 (1967), *quoting* Kent v. United States, 383 U.S. 541, 562 (1966).

[361] 383 U.S. 541 (1966).

[362] 209 So. 2d 841, 843 (1968).

[363] The factors set out in the appendix to *Kent* are:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property,

A certification hearing is undoubtedly not held in every case where a child of age 13 or older is charged with the commission of a felony.[364] In many cases, a preliminary social investigation ordered by the youth court judge will clearly indicate that the best interests of the child will be better served by the special features of the youth court system. In those cases, the youth court will proceed directly to a delinquency adjudicatory hearing. However, if a certification hearing is held, it must be held before any hearing in the youth court in which the youth may be adjudicated a delinquent.[365]

If a certification hearing is held, and the youth court judge decides to waive the jurisdiction of the youth court, he must enter an order certifying the child to the proper adult court. In the absence of proper certification by the youth court, the adult court has no jurisdiction.[366] To be a valid waiver the order must contain: (1) an affirmative showing that a hearing was had in the presence of the minor and his parent(s), guardian, or custodian; (2) facts showing that the youth court had

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greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable habilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

383 U.S. at 566-67.

[364] *See* Breed v. Jones, 421 U.S. 519, 538 (1975).

[365] *Id.* at 535-40. In *Breed* the United States Supreme Court said:

[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support a decision to transfer a juvenile for trial in adult court. We require only that, whatever the relevant criteria, and whatever the evidence demanded, a state determine whether it wants to treat a juvenile within the juvenile court system before entering upon a proceeding that may result in an adjudication that he has violated a criminal law and in a substantial deprivation of liberty. . . .

Id. at 537.

[366] Butler v. State, 217 So. 2d 525, 525-26 (Miss. 1969).

jurisdiction of the case and of the parties; (3) facts showing that the minor was represented by counsel, or that the right to counsel was properly waived; (4) facts and reasons underlying the youth court's decision and showing that a full investigation was had in the case.[367] The statement of the reasons motivating the waiver by the youth court must state the basis for the certification order with sufficient specificity to permit meaningful review.[368]

5. The Delinquency Adjudication Hearing

Section 43-21-17 provides that the juvenile delinquency adjudicatory hearing will be of a civil nature without a jury and that the general public will be excluded.[369] However, any interested party may appear and be represented by counsel.[370] The statute also requires that the hearing "be conducted under such rules of evidence as may comply with applicable constitutional standards."[371]

When a petition is filed, the child and his parents, guardians, or custodians must be afforded due process in any adjudicatory hearing.[372] That is, the hearing "must measure up to the essentials of due process and fair treatment."[373] In Mississippi, a youth is entitled to the same rights as is an adult to due process of law.[374] A youth has a right to have his parent present with him in the courtroom during the hearing, and for the court to exclude the parent from the courtroom, even when the parent is to be a witness and the rule for sequestering witnesses is invoked, is a violation of due process of law.[375] Perhaps in days past a youth court judge could act arbitrarily toward a youth defendant, but

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[367] Hopkins v. State, 209 So. 2d 841, 844 (Miss. 1968); *see* Kent v. United States, 383 U.S. 541, 561 (1966); *cf.* Monk v. State, 238 Miss. 658, 659-60, 116 So. 2d 810, 811 (1960).

[368] Kent v. United States, 383 U.S. 541, 561 (1966).

[369] MISS. CODE ANN. § 43-21-17 (Supp. 1975).

[370] *Id.*

[371] *Id.* The statute as amended in 1973 reflects some of the impact of the federal constitutional decisions of *In re* Gault, 387 U.S. 1 (1967), and *In re* Winship, 397 U.S. 358 (1970), in the provision made for the conduct of the adjudicatory hearing, but the 1973 amendment is not fully reflective of those decisions. Prior to the 1973 amendment, the statute read in part:

> and the hearing shall be conducted in an informal manner under such rules as the court may prescribe, without regard to the technicalities of other statutory procedures and rules of evidence . . . .

MISS. CODE ANN. § 43-21-17 (1972).

[372] *In re* Dennis, 291 So. 2d 731, 735 (Miss. 1974).

[373] *In re* Gault, 387 U.S. 1, 30-31 (1967).

[374] Love v. State, 221 So. 2d 92, 95 (Miss. 1969); *In re* Slay, 245 Miss. 294, 300, 147 So. 2d 299, 302 (1962).

[375] Hopkins v. Youth Court, 227 So. 2d 282, 284 (Miss. 1969).

flagrantly arbitrary action by the judge, such as to call a youthful defendant before the bench and demand that he admit his guilt, is now a clear violation of due process.[376]

a. Assistance of Counsel

The child and his parents must be notified of the child's right to be represented by counsel retained by them,[377] or if they are unable to afford counsel, the parents must be informed that counsel will be appointed to represent the child.[378] Mere knowledge by a child's parents that the child is entitled to counsel, followed by their failure to act on that knowledge, is not a waiver of the right to counsel.[379] The child and his parents must be expressly advised that they may retain counsel, and they must be confronted with the specific decision of whether they wish to waive the right.[380] Furthermore, if they choose not to waive counsel but show that they are unable to afford counsel, they have a right to have counsel appointed to represent the child.[381] This right is not only statutory[382] but is also constitutionally guaranteed.[383]

b. Privilege Against Self-Incrimination

The fifth amendment provides that a person shall not be "compelled in any criminal case to be a witness against himself,"[384] and although youth court adjudicatory hearings are statutorily defined as "civil" proceedings,[385] such adjudicatory proceedings are held to be "criminal" for purposes of the privilege against self-incrimination.[386] The constitutional privilege against self-incrimination is applicable to children and must be given full effect in youth court adjudicatory hearings.[387]

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[376] *See In re* Dollar, 293 So. 2d 458, 460 (Miss. 1974).

[377] *In re* Gault, 387 U.S. 1, 41 (1967); *In re* Triplett, 292 So. 2d 171, 172 (Miss. 1974); *In re* Long, 184 So. 2d 861, 862 (Miss. 1966).

[378] *In re* Gault, 387 U.S. 1, 41 (1967); *In re* Triplett, 292 So. 2d 171, 172 (Miss. 1974).

[379] *In re* Gault, 387 U.S. 1, 42 (1967).

[380] *Id.*; *In re* Triplett, 292 So. 2d 171, 172 (Miss. 1974).

[381] *In re* Gault, 387 U.S. 1, 42 (1967); *In re* Edwards, 298 So. 2d 703, 704 (Miss. 1974); *In re* Triplett, 292 So. 2d 171, 172-73 (Miss. 1974).

[382] MISS. CODE ANN. § 99-15-15 (1972).

[383] *In re* Gault, 387 U.S. 1, 42 (1967); *In re* Triplett, 292 So. 2d 171, 172-73 (Miss. 1974); *In re* Gressett, 272 So. 2d 921, 922 (Miss. 1973).

[384] U.S. CONST. amend. V.

[385] MISS. CODE ANN. § 43-21-17 (Supp. 1975).

[386] *In re* Gault, 387 U.S. 1, 49 (1967); *In re* Dennis, 291 So. 2d 731, 733 (Miss. 1974).

[387] *In re* Gault, 387 U.S. 1, 55 (1967); *In re* Dennis, 291 So. 2d 731, 733 (Miss. 1974); *In re* Gressett, 272 So. 2d 921, 922 (Miss. 1973).

Any confessions or admissions made by a child which are self-incriminating must meet the constitutional standards of due process in order to be admissible into evidence.[388] Furthermore, if a child has made an admission when counsel was unavailable for some permissible reason, the court should take great care to assure that the admission was voluntary, not only in the sense that it may have been suggested or coerced, but also in the sense that it may have been the product of ignorance of rights, youthful fantasy, fright, or despair.[389] However, a confession is not rendered involuntary merely because the person making it is a minor.[390] Age is one of several factors to be considered in determining whether a waiver of the right to remain silent and a subsequent confession or admission is free and voluntary.[391] A minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other adult, and the admissibility of such confession depends on a combination of several factors including age, intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.[392] In Mississippi, it has been held that where the record of the adjudicatory hearing failed to show other evidence of the *corpus delicti* of crimes charged, the minor's confession that he committed those crimes was not sufficient to establish beyond a reasonable doubt that specific offenses were committed or that the defendant committed them.[393] The Mississippi standard is stricter than the *Gault* requirement that other witnesses must be presented "absent a valid confession adequate to support the determination" of the court.[394]

A child defendant's privilege against self-incrimination also includes the right to testify only upon the issue of the admissibility of his confession without taking the stand as a general witness in the trial of the case on its merits.[395] This is the same right enjoyed by an adult defendant in a criminal trial.

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[388] *In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974).

[389] *In re* Gault, 387 U.S. 1, 55 (1967); *In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974).

[390] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974).

[391] *In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974); *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974); McLeod v. State, 229 So. 2d 557, 558-59 (Miss. 1970). In *Wise*, a 13 year-old boy, who had been given his *Miranda* rights by a sheriff, was held to have voluntarily confessed to telephoning a young girl and threatening to rape and kill her. The boy did not request an attorney or the presence of his parent who was inside his house a few feet away.

[392] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974).

[393] *In re* Earles, 294 So. 2d 171, 172 (Miss. 1974). In *Earles*, the defendant was charged with larceny and burglary. Other than the defendant's confession, there was no proof to relate the confessed crimes to crimes actually committed.

[394] *In re* Gault, 387 U.S. 1, 56 (1967).

[395] *In re* Dollar, 293 So. 2d 458, 459 (Miss. 1974); *In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974).

c. *Right to Confrontation*

A youth is entitled to the constitutional guarantees of confrontation and cross-examination at the adjudicatory hearing,[396] but he must assert them in timely fashion or he will be held to have waived them.[397] In Mississippi, since a confession by a youth of a crime, uncorroborated by other evidence, is insufficient for an adjudication of delinquency,[398] the opportunity to exercise the right of confrontation should present itself at every hearing where the child is charged with commission of a crime.

If a youth who has formerly been adjudicated a delinquent is called to testify against the youth defendant, the right of the defendant to cross-examine his accuser is superior to the statutory right of the witness to keep secret his former delinquent activity.[399]

d. *Burden of Proof Required*

In those cases involving a possible loss of freedom, the due process clause protects the juvenile defendant against being adjudicated a delinquent and committed to an institution unless proof beyond a reasonable doubt is established of each and every element necessary to constitute the offense with which the child is charged.[400] If the proof fails in this respect, the child must be discharged and the proceedings against him dismissed.[401]

e. *Evidentiary Rules*

Section 43-21-17 requires that any adjudicatory hearing shall be conducted under such rules of evidence as may comply with applicable constitutional standards.[402] This statutory standard for the rules of evidence, implemented together with the requirement that youths have the same rights as adults to due process of law, results in a proceeding that is adversary in nature. In the adjudicatory hearing, the youth's counsel must act alertly to protect the rights of the child and to preserve the

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[396] *In re* Gressett, 272 So. 2d 921, 922 (Miss. 1973).

[397] *In re* Wise, 291 So. 2d 727, 730 (Miss. 1974).

[398] *In re* Earles, 294 So. 2d 171, 172 (Miss. 1974). See text accompanying notes 393 & 394 *supra*.

[399] Davis v. Alaska, 415 U.S. 308, 319-20 (1974); Hamburg v. State, 248 So. 2d 430, 434 (Miss. 1971).

[400] *In re* Winship, 397 U.S. 358, 364 (1970); *In re* Earles, 294 So. 2d 171, 172 (Miss. 1974); *In re* Jenkins, 274 So. 2d 143, 144 (Miss. 1973); *In re* Napp, 273 So. 2d 502, 503 (Miss. 1973); *In re* Gressett, 272 So. 2d 921, 922 (Miss. 1973).

[401] *In re* Earles, 294 So. 2d 171, 172 (Miss. 1974).

[402] *In re* Dennis, 291 So. 2d 731, 734 (Miss. 1974); Miss. Code Ann. § 43-21-17 (Supp. 1975).

record for appeal—he cannot rely upon the court to protect the child's interest.[403]

Among rulings made by the Mississippi Supreme Court related to evidentiary rules applicable to an adjudicatory hearing is that a litigant is entitled to make an offer of proof to enable the trial court to exercise its discretion and to make a record that can be reviewed on appeal.[404] In addition when it is within the scope of the pleadings, evidence that the child has committed a crime is admissible and may be considered for the purpose of determining whether or not he is delinquent.[405]

f. Trier of Fact

The statute prescribing the nature of juvenile delinquency adjudicatory hearings provides that the hearing shall be "without jury."[406] This statutory provision was held to be constitutional by the Mississippi Supreme Court in *Hopkins v. Youth Court*[407] and later by the United States Supreme Court in *McKeiver v. Pennsylvania*.[408]

6. Retained Jurisdiction Over Adjudicated Delinquent Children

When the youth court judge adjudges a child to be delinquent, the youth court may retain or resume jurisdiction over the child, as well as of any subsequent offenses committed by the child, until the child reaches his 20th birthday.[409] Upon an adjudication of delinquency, the court possesses wide discretion and flexibility as to what course of action to take in the child's best interest.[410] Within the court's continuing juris-

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[403] *E.g., In re* Dudley, 310 So. 2d 919 (Miss. 1975); *In re* Wise, 291 So. 2d 727 (Miss. 1974). In *Wise*, the child's counsel failed to object to hearsay testimony and failed to require the prosecution to produce the prosecutrix. He was held to have waived the right to raise on appeal either the hearsay question or a violation of the defendant's right of confrontation.

In *In re* Dudley, 310 So. 2d 919 (Miss. 1975), the Mississippi Supreme Court noted that the record was so "replete with inadmissible hearsay testimony that appellant was effectively denied his right to a fair hearing." *Id.* at 919-20.

[404] Hopkins v. Youth Court, 227 So. 2d 282, 285 (Miss. 1969).

[405] *In re* Suratt, 273 So. 2d 178, 179 (Miss. 1973).

[406] MISS. CODE ANN. § 43-21-17 (Supp. 1975).

[407] 227 So. 2d 282, 285 (Miss. 1969).

[408] 403 U.S. 528 (1971). In *McKeiver*, the Court concluded that "trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement." *Id.* at 545.

[409] MISS. CODE ANN. § 43-21-9 (1972); *see In re* Suratt, 273 So. 2d 178, 181 (Miss. 1973); *In re* Green, 203 So. 2d 470, 472 (Miss. 1967), *cert. denied*, 392 U.S. 945 (1968). The youth court has no jurisdiction over a child of age 18 or older unless the child is being held under an order of the youth court made before the child's 18th birthday. Smith v. State, 229 So. 2d 551, 557 (Miss. 1969).

[410] *In re* Suratt, 273 So. 2d 178, 181 (Miss. 1973); Hopkins v. Youth Court, 227 So. 2d 282, 285 (Miss. 1969).

diction of a delinquent child is the continuing power to alter the terms of the arrangement imposed upon the child following adjudication of delinquency.[411] Among the alternative arrangements available to the court are: placement of the child under supervision in his own home under conditions imposed by the court; placement of the child in a suitable foster home; placement of the child in a suitable private institution; and commitment of the child to a state training school.[412] However, a child less than 10 years old or more than 17 years old may not be committed to a state training school.[413] When a child is adjudicated a delinquent for the first time, he is not entitled as a matter of law to a suspended sentence; he may be placed in a training school even though it is his first offense.[414] Furthermore, a child who violates any state law or municipal ordinance, even though it is his first such offense, may be adjudicated a delinquent.[415] A child committed to a state training school may be retained there until his twentieth birthday, unless paroled by the school superintendent.[416]

The youth court may elect to place the delinquent child on probation on such terms as it sees fit to impose. Such a broad probationary condition as that "he should stay out of all trouble" has been held not to be vague or indefinite and not a violation of the due process clause of the fourteenth amendment.[417] The Mississippi Supreme Court has also decided that the express terms of a delinquent child's probation carry with them an implied condition of good behavior.[418]

After a child has been adjudicated a delinquent, an investigation is made by the court to help determine his subsequent disposition.[419] After the investigation has been made, the court may revise its probationary terms, change the custody of the child, including commitment to a training school, dismiss the petition against the child, or terminate its jurisdiction over the child.[420] However, if a child files a post-commitment petition alleging that his adjudication as a delinquent resulted from a violation of his constitutional rights, the youth court *must*

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[411] *In re* Litdell, 232 So. 2d 733, 736 (Miss. 1970).

[412] MISS. CODE ANN. § 43-21-19 (1972).

[413] *Id.*

[414] *In re* Suratt, 273 So. 2d 178, 180 (Miss. 1973); *cf. In re* Wise, 291 So. 2d 727 (Miss. 1974).

[415] *In re* Suratt, 273 So. 2d 178, 180 (Miss. 1973); *cf. In re* Wise, 291 So. 2d 727 (Miss. 1974).

[416] MISS. CODE ANN. § 43-21-19 (1972).

[417] *In re* Green, 203 So. 2d 470, 472 (Miss. 1967), *cert. denied*, 392 U.S. 945 (1968).

[418] *In re* Litdell, 232 So. 2d 733, 736 (Miss. 1970).

[419] *Id.*; MISS. CODE ANN. § 43-21-19 (1972).

[420] *In re* Litdell, 232 So. 2d 733, 736 (Miss. 1970); MISS. CODE ANN. § 43-21-19 (1972).

hold a full hearing on the petition, and the youth court's holding on the allegations of the petition are reviewable on appeal.[421]

CONCLUSION

The preceding discussions of the rights of a person charged with commission of a crime, or of a youth charged with commission of other delinquent acts, may seem to be somewhat unrelated. Actually each of these topical areas correlate under the accused's protective umbrella of due process of law. To the extent that these rights derive from the federal constitution, they apply to the states through the due process clause of the fourteenth amendment. To the extent that these rights derive from the Mississippi constitution and statutes, they emanate from the provisions designed to assure perpetuation of the American concept of justice. These rights, having been subjected to substantial judicial interpretation during the past few years, are now far more precisely delineated and exercisable than they were just a decade ago. It is the author's hope that this comment has served to refresh the Mississippi Bar's familiarity with these concepts and that the portion of the Mississippi Bar that represents persons accused of crime or delinquency will more effectively be able to assure that no person is deprived of his liberty without due process of law.

John Henry Crouch

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[421] Love v. State, 221 So. 2d 92, 95-96 (Miss. 1969).

RECENT DECISIONS

FEDERAL COURTS—INJUNCTIONS AGAINST STATE COURT PROCEEDINGS—STATE PROSECUTION CONSIDERED PENDING IF COMMENCED PRIOR TO FEDERAL PROCEEDINGS OF SUBSTANCE ON THE MERITS

Appellees[1] filed suit in the United States District Court for the Central District of California against the appellants,[2] seeking injunctive and declaratory relief[3] against enforcement of California's obscenity statute and the return of seized films.[4] The day after the appellees filed their federal action, they were joined as defendants in a state prosecution already pending against their employees.[5] A three-judge district court granted both declaratory and injunctive relief, rejecting appellants' contention that the federal action sought to interfere with a pending state prosecution and should be dismissed.[6] The court further found that even if the state prosecution constituted a pending suit, dismissal was not imperative because the appellees had demonstrated the requisite bad faith and harassment necessary for relief against pending state prosecutions.[7] On direct appeal to the United States Supreme Court, *held*, reversed.[8] Where a state institutes criminal proceedings against a federal plaintiff before the federal court has begun proceedings of substance on the merits or where the federal plaintiffs' interests are intertwined with those of a defendant in a pending state prosecution, the federal complaint should be dismissed absent sufficient proof of bad faith and harrassment.[9] *Hicks v. Miranda*, 95 S. Ct. 2281 (1975).

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[1] The suit was filed by Vincent Miranda who was doing business as Walnut Properties. Walnut Properties owned the land on which the theatre was located. The Pussycat Theatre was a California corporation of which Miranda was president and a stockholder. Hicks v. Miranda, 95 S. Ct. 2281, 2285 n.2 (1975).

[2] The appellants were the District Attorney and Assistant District Attorney of Orange County and four police officers of Buena Park. *Id.* at 2286.

[3] The appellees also sought but were denied a temporary restraining order. *Id.*

[4] CAL. PENAL CODE § 311-12.5 (West Supp. 1975), *amending* CAL. PENAL CODE § 311-12.5 (West 1970).

[5] Hicks v. Miranda, 95 S. Ct. 2281, 2287 (1975). Four copies of the film "Deep Throat" had previously been seized and an eight-count misdemeanor charge had been filed against two employees of the theatre. *Id.* at 2285.

[6] Miranda v. Hicks, 388 F. Supp. 350, 356, 359-60 (C.D. Cal. 1974).

[7] *Id.* at 360. The district court viewed the pattern of search warrants and seizures, combined with the fact that the prosecution against the appellees was not instituted until after the federal complaint was filed, as demonstrating bad faith and harassment. *Id.* at 361-62.

[8] The Supreme Court held that both the injunction and the declaratory judgment were properly before the Court on direct appeal under 28 U.S.C. § 1253 (1970). 95 S. Ct. at 2288-89. Although the propriety of a three-judge court was considered in detail, this note will not discuss that aspect of the decision.

[9] The Supreme Court found that, absent any attempt to discredit the right of the prosecuting officials to rely on judicial authorization for their conduct, the district court findings of bad faith and harassment were vague and conclusory. 95 S. Ct. at 2292-93.

The federal courts have traditionally been reluctant to prevent enforcement of an unconstitutional state statute by interfering in state judicial proceedings through the granting of injunctive relief or otherwise.[10] This reluctance stems from the 1793 federal anti-injunction statute.[11] The present anti-injunction statute[12] combined with the general principles of equity,[13] comity,[14] federalism,[15] and

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[10] Younger v. Harris, 401 U.S. 37, 43 (1971); Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943). Intervention in this context denotes interjection of federal judicial power before completion of the state judicial proceedings.

[11] Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334. The legislative history of the statute is not helpful because it relates only minutes of the proceedings. *See* 4 ANNALS OF CONG. 143 (1793) [1789-1824]. Thus, the original purposes of the statute are obscure. *E.g.*, Taylor & Willis, *The Power of Federal Courts To Enjoin Proceedings in State Courts*, 42 YALE L.J. 1169, 1170-71 (1933). *See generally* Durfee & Sloss, *Federal Injunctions Against Proceedings in State Courts: The Life History of a Statute*, 30 MICH. L. REV. 1145, 1145-46 (1932); Note, *Federal Power to Enjoin State Court Proceedings*, 74 HARV. L. REV. 726, 727 (1961); Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 480 (1965). The more plausible theories are reviewed in Toucey v. New York Life Ins. Co., 314 U.S. 118, 130-32 (1941). *But cf.* Comment, *Federal Court Stays of State Court Proceedings: A Re-Examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 613, 624 (1971) (rejecting premise that the original statute rested primarily on the "principle of independent state judicial systems").

[12] 28 U.S.C. § 2283 (1970). The original 1793 anti-injunction statute absolutely forbade injunctive relief. Act of March 2, 1793, ch. 22, § 5, 1 Stat. 334. However, for many years numerous court-made exceptions greatly reduced the effectiveness of the statute. Then, in 1941 the Court rejected the relitigation exception and in dictum rejected all others, retaining only the rule that a federal court can stay state proceedings affecting property in the custody of the federal court. Toucey v. New York Life Ins. Co., 314 U.S. 118, 135-41 (1941); Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 366-78 (1930). Apparently in response to *Toucey*, Congress in 1948 revised the statute, thereby reinstating the exceptions. Act of June 25, 1948, ch. 646, 62 Stat. 968; *see* C. WRIGHT, THE LAW OF FEDERAL COURTS § 47, at 178-79 (2d ed. 1970); Comment, *Federal Injunctive Relief Against State Court Criminal Proceedings: From Young to Younger*, 32 LA. L. REV. 601, 610-11 (1972); Comment, *Federal Court Stays of State Court Proceedings: A Re-Examination of Original Congressional Intent, supra* note 11; Comment, *Anti-Suit Injunctions Between State and Federal Courts, supra* note 11, at 480. This statute had been held applicable only to pending state proceedings. Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965); C. WRIGHT, *supra*, § 47, at 179; Whitten, *Federal Declaratory and Injunctive Interference With State Court Proceedings: The Supreme Court and The Limits of Judicial Discretion*, 53 N.C.L. REV. 591, 639 (1975); Comment, *Federal Injunctive Relief Against State Criminal Proceedings: From Young to Younger, supra*, at 611; Comment, *Anti-Suit Injunctions Between State and Federal Courts, supra* note 11, at 480. Thus today's statute contains three statutory exceptions and now reads:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by an Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. § 2283 (1970).

[13] There are three traditional doctrines of equity jurisprudence which originated in early English chancery practice that governed the issuance of injunctive relief. *See*

the abstention doctrine,[16] has precluded federal intervention, save for a few statutory[17] and judicial[18] exceptions. The inherent interplay between potentially

Younger v. Harris, 401 U.S. 37, 44 (1971); 1 J. HIGH, A TREATISE ON THE LAW OF INJUNCTIONS §§ 23, 68 (3d ed. 1890); 1 H. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS §§ 58-59 (1909). The first doctrine, that equity will not enjoin a criminal proceeding, evinces itself today as a policy against federal intervention in state court proceedings. *See* Younger v. Harris, *supra*, at 44. The other two doctrines, that the plaintiff must demonstrate a threat of irreparable injury and that injury must be imminent and substantial, persist as requirements that must be met before an injunction can issue. Irreparable injury means that the plaintiff's legal remedy is inadequate. *See id.* at 44-45; Fenner v. Boykin, 271 U.S. 240, 243-44 (1926).

[14] The concept of comity obliges federal courts in the exercise of their jurisdiction to render proper respect and consideration to the sovereign status of an individual state and embraces the belief that "the National Government will fare best if the States and their institutions are left free to perform their functions in their separate ways." Younger v. Harris, 401 U.S. 37, 44 (1971); *see* Boyer, *Federal Injunctive Relief: A Counterpoise Against the Use of State Criminal Prosecutions Designed to Deter the Exercise of Preferred Constitutional Rights*, 13 How. L.J. 51, 72-76 (1967); Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEXAS L. REV. 535, 541 (1970).

[15] Federalism is a system in which this doctrine of comity operates to produce sensitivity to the needs of both the state and federal governments thus preventing unnecessary interference in state affairs by the national government. Younger v. Harris, 401 U.S. 37, 44 (1971). *See generally* I. DUCHACEK, COMPARATIVE FEDERALISM: THE TERRITORIAL DIMENSION OF POLITICS (1970); Grodzins, *The American System as a Single Mechanism*, in GOVERNING THE STATES AND LOCALITIES 3-10 (D. Lockhard ed. 1969); Bell, *Federalism In Correct Perspective*, 1 GA. L. REV. 586 (1967).

[16] The doctrine of abstention, that a federal court should in certain circumstances abstain from exercising its jurisdiction even though properly invoked, is principally grounded in considerations of comity. Maraist, *supra* note 14, at 541. Abstention could be based on: (1) avoidance of a federal constitutional question when the case can be decided on a question of state law, Railroad Comm'n v. Pullman Co., 312 U.S. 496, 501 (1941); (2) avoidance of needless conflict with a state's administrative processes, Burford v. Sun Oil Co., 319 U.S. 315, 318, 327 (1943); (3) leaving the resolution of unsettled state law to the states, Meredith v. City of Winterhaven, 320 U.S. 228, 234 (1943); (4) easing the congestion of the federal court docket, *see* Ashman, Alfini & Shapiro, *Federal Abstention: New Perspectives On Its Current Vitality*, 46 MISS. L.J. 629, 631-32 (1975). *See also* C. WRIGHT, *supra* note 12, § 52; Schoenfeld, *American Federalism and the Abstention Doctrine in the Supreme Court*, 73 DICK. L. REV. 605 (1969); Wright, *The Abstention Doctrine Reconsidered*, 37 TEXAS L. REV. 815, 826 (1959); Note, *Consequences of Abstention by a Federal Court*, 73 HARV. L. REV. 1358 (1960); Note, *Power to Decline The Exercise of Federal Jurisdiction*, 37 MINN. L. REV. 46 (1952); Note, *Abstention: An Exercise In Federalism*, 108 U. PA. L. REV. 226 (1959). Abstention as a doctrine preventing federal intervention complements the doctrines of equity and comity. *See* McCormack, *Developments In the Availability of Federal Remedies Against State Actions*, 16 WM. & MARY L. REV. 1, 6-9 (1974).

[17] See notes 12 *supra* & 47 through 49 *infra* and accompanying text.

[18] Traditional equitable prerequisites must be met before an injunction can issue. Thus, to be granted federal relief, a plaintiff must show great, immediate, and irreparable

exercisable power and self-restraint came into focus in the 1870's. The Civil Rights Act of 1871, which first provided the federal courts with the power to enjoin unconstitutional action by state officials,[19] and the expansion in 1875 of federal question jurisdiction,[20] had christened the federal courts in their role as the primary guardians of federal constitutional rights.[21] In opposition, the eleventh amendment, which prohibits private citizens from maintaining suits against the states in federal court, was originally thought to insulate state officials from suit as well.[22] A legal fiction, however, precipitated *Ex parte Young*[23] into a fountainhead for federal interference with state prosecutions. In 1908 the United States Supreme Court in *Ex parte Young*, treating the identity of a state and its officials separately, maintained that when a state official acts unconstitutionally beyond the scope of his authority a suit against the official is not a suit against the state.[24] Overcoming the eleventh amendment obstacle, *Ex parte Young* sanctioned intervention in threatened state actions upon a danger of great and immediate irreparable injury to the complainant.[25] Moving into an era of greater restraint in the 1940's after diverse reaction to *Ex parte Young*,[26] the

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harm. Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943); Watson v. Buck, 313 U.S. 387, 400-01 (1941).

[19] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, *codified as* 42 U.S.C. § 1983 (1970).

[20] Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470, *codified as* 28 U.S.C. § 1331 (1970).

[21] Steffel v. Thompson, 415 U.S. 452, 464 (1974); Zwickler v. Koota, 389 U.S. 241, 247 (1967).

[22] C. WRIGHT, *supra* note 12, § 48; Maraist, *Federal Intervention In State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEXAS L. REV. 1324 (1972); Maraist, *supra* note 14, at 542-43; Note, *Federal Jurisdiction—Younger v. Harris: A Current Appraisal of the Policy Against Federal Court Interference With State Court Proceedings*, 21 DE PAUL L. REV. 519, 530 (1971).

[23] 209 U.S. 123 (1908).

[24] *Id.* at 159-60; C. WRIGHT, *supra* note 12, § 48; Note, *Federal Relief Against Threatened State Prosecutions: The Implications of Younger, Lake Carriers and Roe*, 48 N.Y.U.L. REV. 965 (1973).

[25] 209 U.S. at 161, 167.

[26] After *Ex parte Young*, controversy in the states arose over the power of a single judge to grant an injunction against state proceedings. C. WRIGHT, *supra* note 12, § 48. In response, Congress, in 1910, enacted legislation requiring a three-judge court to consider the constitutionality of a state statute before an injunction could issue against enforcement of the statute and providing for direct appeal to the Supreme Court. Steffel v. Thompson, 415 U.S. 452, 465 (1974); 28 U.S.C. § 2281 (1970); 45 CONG. REC. 7256 (1910); C. WRIGHT, *supra* note 12, § 50; Maraist, *supra* note 14, at 544; Comment, *Federal Court Intervention in Pending State Criminal Prosecutions—The Significance of Younger v. Harris*, 6 U. RICH. L. REV. 347, 350 (1972). *See also* Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Note, *The Three-Judge District Court: Scope and Procedure Under § 2281*, 77 HARV. L. REV. 299 (1963); Comment, *Convening Three-Judge Courts: Who Decides?*, 20 J. PUB. L. 299 (1971).

Federal plaintiffs, on the other hand, were critical of the traditional obstacles to injunctive relief. Steffel v. Thompson, *supra* at 466; Perez v. Ledesma, 401 U.S. 82, 111 (1971). Thus in 1934, Congress enacted the Declaratory Judgment Act. Act of June 14, 1934, ch. 512, 48 Stat. 955. The Act now reads:

Court indicated in *Douglas v. City of Jeannette*[27] that intervention would be rare,[28] although alluding to several categories of exceptional circumstances when intervention would be appropriate.[29] In 1948, Congress amended the federal

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> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
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> . . . .
>
> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 U.S.C. §§ 2201-02 (1970). A declaratory judgment, unlike an injunction enforced by contempt powers, was intended to have no coercive effect and thus be a less intrusive remedy. Steffel v. Thompson, *supra* at 465; Perez v. Ledesma, 401 U.S. 82, 112 (1971); *see* S. Rep. No. 1005, 73d Cong., 2d Sess. 2-3 (1934); Maraist, *supra* note 22, at 1337.

The legislative history of the Act recognizes that anticipatory relief is desirable and that coercive relief will ordinarily be unnecessary. S. Rep. No. 1005, 73d Cong., 2d Sess. 2-6 (1934); H.R. Rep. No. 1264, 73d Cong., 2d Sess. 2 (1934). The legislative history also reveals that a declaratory judgment was intended to be available against criminal statutes where an injunction would not be appropriate. *See* S. Rep. No. 1005, 73d Cong., 2d Sess. 3, 6 (1934); E. Borchard, Declaratory Judgments 1024 (2d ed. 1941). The remedy was intended to be discretionary, but the court's discretion was not to be governed by the traditional prerequisites, in particular the irreparable injury requirement, to injunctive relief. Perez v. Ledesma, 401 U.S. 82, 115 (1971). Justice Brennan, summarizing the availability of a declaratory judgment, stated:

> When no state proceeding is pending and federal intervention is therefore appropriate . . . [o]rdinarily a declaratory judgment will be appropriate if the case-or-controversy requirements of Article III are met, if the narrow, special factors warranting federal abstention are absent, and if the declaration will serve a useful purpose in resolving the dispute.

Id. at 121-22. *See also* W. Anderson, Actions for Declaratory Judgments (2d ed. 1951); E. Borchard, *supra*; Borchard, *Discretion To Refuse Jurisdiction of Actions for Declaratory Judgments*, 26 Minn. L. Rev. 677 (1942); Borchard, *The Federal Declaratory Judgment Act*, 21 Va. L. Rev. 35, 49 (1934); Borchard, *Challenging "Penal" Statutes by Declaratory Action*, 52 Yale L.J. 445 (1943); Dickson, *Declaratory Remedies and Constitutional Change*, 24 Vand. L. Rev. 257 (1971); Note, *Declaratory Relief in the Criminal Law*, 80 Harv. L. Rev. 1490 (1967); *Developments in the Law—Declaratory Judgments 1941-1949*, 62 Harv. L. Rev. 787 (1949).

[27] 319 U.S. 157 (1943) (defense of a single good faith criminal prosecution was an adequate remedy at law).

[28] *Id.* at 165; *see* Watson v. Buck, 313 U.S. 387, 400 (1941) (failure to demonstrate specific threat to plaintiff); Beal v. Missouri Pac. R.R., 312 U.S. 45, 50 (1941)(no threat of multiple prosecutions); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89, 96 (1935)(the threatened injury must be great and immediate as well as irreparable); Maraist, *supra* note 22, at 1325; *Developments in the Law—Injunctions*, 78 Harv. L. Rev. 994, 1025-26 (1965).

[29] The Court intimated an injunction would be appropriate if: (1) a federal plaintiff was threatened with multiple prosecutions under an unconstitutional statute, Douglas v.

anti-injunction statute.[30] In the 1960's, the Court impliedly loosened restraints on federal court intervention because state courts failed to protect constitutional rights adequately.[31] Exemplary was the Court's decision in *Dombrowski v. Pfister*,[32] which appeared to allow interference with a threatened state prosecution if a "chilling effect" upon fragile first amendment rights was present.[33]

City of Jeannette, 319 U.S. 157, 165 (1943); *see* Watson v. Buck, 313 U.S. 387, 400 (1941); Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); (2) an unconstitutional statute was employed for harassment purposes, *see* Douglas v. City of Jeannette, 319 U.S. 157, 164 (1943). The Court had previously indicated that relief would be available if a statute was found to be flagrantly unconstitutional. Watson v. Buck, 313 U.S. 387, 402 (1941) (dictum).

[30] See note 12 and accompanying text *supra*.

[31] This trend was but part of the Warren Court's activist response to the civil rights movement. *See* Maraist, *supra* note 22, at 1326-27; Whitten, *supra* note 12, at 635; Comment, *Federal Court Intervention in Pending State Criminal Prosecutions—The Significance of Younger v. Harris*, *supra* note 26. *See generally* A. BICKELL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); A. COX, THE WARREN COURT (1968).

[32] 380 U.S. 479 (1965), *noted in* 51 A.B.A.J. 580 (1965); 1966 DUKE L.J. 219; 3 SAN DIEGO L. REV. 76 (1966); 32 TENN. L. REV. 641 (1965). For further discussion, see Brewer, *Dombrowski v. Pfister: Federal Injunctions Against State Prosecutions In Civil Rights Cases—A New Trend In Federal-State Judicial Relations*, 34 FORDHAM L. REV. 71 (1965); *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 170 (1965); Note, *HUAC and the "Chilling Effect": The Dombrowski Rationale Applied*, 21 RUTGERS L. REV. 679 (1967); Comment, *The Louisiana Compromise, Abstention and Vagueness: Dombrowski v. Pfister*, 13 U.C.L.A.L. REV. 153 (1966).

[33] Dombrowski v. Pfister, 380 U.S. 479, 485-89 (1965). *Dombrowski*, however, did encompass a bad faith prosecution that under prior law would itself justify the issuance of an injunction. Younger v. Harris, 401 U.S. 37, 48-50 (1971). But a train of analysis dealing with the chilling effect, independent of bad faith, ran through the decision. Carey, *Federal Court Intervention in State Prosecutions*, 56 MASS. L.Q. 11, 13 (1971). As a result, the lower court decisions split on whether a chilling effect alone under a facially unconstitutional statute was enough to justify intervention or whether in addition there must be evidence of bad faith. *Compare* University Comm. to End the War in Viet Nam v. Gunn, 289 F. Supp. 469, 472 (W.D. Tex. 1968); *and* Smith v. Hill, 285 F. Supp. 556, 562 (E.D.N.C. 1968); *with* Robinson v. Bradley, 300 F. Supp. 665, 667 (D. Mass. 1969)(dictum); Davis v. Francois, 278 F. Supp. 466, 467 (E.D. La. 1967), *rev'd*, 395 F.2d 730 (5th Cir. 1968). The subsequent decisions in Cameron v. Johnson, 390 U.S. 611 (1968) and Zwickler v. Koota, 389 U.S. 241 (1967), read together with *Dombrowski* seemed to mean that either a chilling effect under a facially unconstitutional statute or bad faith enforcement of a facially valid statute would justify intervention. Whitten, *supra* note 12, at 636.

Zwickler was also important because it clearly held that the propriety of declaratory and injunctive relief against threatened state prosecutions should be considered separately and that different standards governed the issuance of each. Zwickler v. Koota, 389 U.S. 241, 254 (1967). See note 42 *infra*.

A "chilling effect" may consist, as in *Dombrowski*, of an inhibition on the exercise of first amendment rights due to threatened enforcement of an overbroad statute regulating expression. Dombrowski v. Pfister, *supra* at 486. The term "bad faith harassment" has generally been understood to mean intimidation with no intention of pressing charges or multiple arrests with no expectations of obtaining valid convictions. Cameron v. Johnson, *supra* at 619.

Since 1971, the Court has returned to pre-*Dombrowski* precedents,[34] articulating a more restrictive view of federal intervention in state proceedings.[35] In *Younger v. Harris*,[36] the Court held that before an injunction against a pending state prosecution may issue, the plaintiff must demonstrate a threat of both *great and immediate, irreparable* injury.[37] Defense of a single good-faith prosecution under a facially unconstitutional statute is not irreparable injury.[38] Moreover, a "chilling effect" alone does not justify intervention.[39] Instead, bad faith and harassment, multiple prosecutions, or other unusual circumstances are necessary to constitute irreparable injury sufficient to justify federal intervention.[40]

In *Younger's* companion cases, the Court began construction of a decision-making framework which revolved around the questions of whether the state prosecution was pending or merely threatened and whether the federal plaintiff sought injunctive or declaratory relief. *Samuels v. Mackell*,[41] applied *Younger* standards in a suit seeking declaratory relief from a pending prosecution.[42] *Perez*

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[34] *See* cases cited in Younger v. Harris, 401 U.S. 37, 46 (1971).

[35] *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 301 (1971); Sedler, *Dombrowski In the Wake of Younger: The View From Without and Within*, 1972 WIS. L. REV. 1; Whitten, *supra* note 12, at 649; Comment, *Federal Declaratory Relief From Unconstitutional State Statutes: The Implications of Steffel v. Thompson*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 520, 520-21 (1974); Note, *supra* note 24.

[36] 401 U.S. 37 (1971), *noted in* 72 COLUM. L. REV. 874 (1972); 21 DE PAUL L. REV. 519 (1972); 9 HOUSTON L. REV. 859 (1972); 60 KY. L.J. 216 (1972); 17 N.Y.L.F. 652 (1972); 67 NW. U.L. REV. 80 (1973); 40 U. CIN. L. REV. 613 (1971); *and* 25 U. MIAMI L. REV. 506 (1971).

Two other *Younger* companion cases, Dyson v. Stein, 401 U.S. 200 (1971) and Byrne v. Karalexis, 401 U.S. 216 (1971), not mentioned in the text, were both vacated and remanded in light of *Younger*.

[37] Younger v. Harris, 401 U.S. 37, 46 (1971); *accord*, Fenner v. Boykin, 271 U.S. 240, 243-44 (1926).

[38] Younger v. Harris, 401 U.S. 37, 46 (1971).

[39] *Id.* at 51. Since *Younger*, as decided, was confined to pending proceedings, the lower courts, after *Younger*, split on the continuing vitality of *Dombrowski* in relation to threatened prosecutions. *Compare* Native Am. Church v. Arizona Corp. Comm'n, 329 F. Supp. 907, 910 (D. Ariz. 1971)(chilling effect without more will not justify intervention), *aff'd*, 405 U.S. 901 (1972); *and* Donohoe v. Duling, 330 F. Supp. 308 (E.D. Va. 1971) (chilling effect not enough), *aff'd*, 465 F. 2d 196 (4th Cir. 1972); *with* Anderson v. Vaughn, 327 F. Supp. 101-02 (D. Conn. 1971)(*Younger* does not apply to threatened prosecutions); *and* Dixon v. Attorney Gen., 325 F. Supp. 966, 971 (M.D. Pa. 1971) (no pending state action; declaratory judgment, therefore, appropriate).

Justice Brennan thought *Dombrowski* would still apply to requests for declaratory relief against threatened prosecutions. Perez v. Ledesma, 401 U.S. 82, 126 (1971); Maraist, *supra* note 22, at 1331.

[40] Younger v. Harris, 401 U.S. 37, 48-49 (1971). *See* note 29 and accompanying text *supra*.

[41] 401 U.S. 66 (1971), *noted in* 57 A.B.A.J. 496 (1971); *see The Supreme Court, 1970 Term, supra* note 35, at 301; Comment, *Federal Jurisdiction: Federal Injunctive and Declaratory Relief From State Statutes Regulating Expression*, 20 J. PUB. L. 581 (1971).

[42] Samuels v. Mackell, 410 U.S. 66, 73 (1971); *accord*, Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 299 (1943). The Court reasoned that declaratory relief has essentially the same practical effect on a pending prosecution as an injunction and so

v. Ledesma,[43] decided on a procedural point, is noteworthy for Justice Brennan's dissenting opinion maintaining that *Samuels* would not preclude declaratory relief when no state proceeding was pending,[44] and in *Boyle v. Landry*,[45] the Court held that without proof of any specific threat of enforcement the federal plaintiffs had failed to demonstrate any irreparable injury.[46] A question reserved in *Younger*[47] was subsequently decided in *Mitchum v. Foster*,[48] which held that section 1983 was an expressly authorized exception to the anti-injunction statute, although the familiar considerations of equity, comity, and federalism were still applicable.[49]

Until the decisions of *Steffel v. Thompson*[50] and *Doran v. Salem Inn, Inc.*,[51]

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should be governed by the same equitable considerations. Samuels v. Mackell, 401 U.S. 66, 72 (1971). Zwickler v. Koota, 389 U.S. 241, 254 (1967), had previously held that declaratory and injunctive relief should be considered independently when relief against threatened prosecutions was requested. Justice Brennan, in *Perez v. Ledesma*, thought *Zwickler* controlled with threatened prosecutions. 401 U.S. at 122. This was also the Court's position in *Steffel v. Thompson*. *See* notes 51 through 54 and accompanying text *infra*.

[43] 401 U.S. 82 (1971).

[44] *Id.* at 121-22.

[45] 401 U.S. 77 (1971).

[46] *Id.* at 80.

[47] *See* Younger v. Harris, 401 U.S. 37, 54 (1971); Cameron v. Johnson, 390 U.S. 611, 613-14 & n.3 (1968); Dombrowski v. Pfister, 380 U.S. 479, 484 n.2 (1965). The refusal to decide whether 42 U.S.C. § 1983 (1970) constituted an exception to 28 U.S.C. § 2283 (1970) produced division among the lower courts. *Compare* Honey v. Goodman, 432 F.2d 333, 343 (6th Cir. 1970) *and* Cooper v. Hutchinson, 184 F.2d 119, 124 (3d Cir. 1950), *with* Baines v. City of Danville, 337 F.2d 579, 590-91 (4th Cir. 1964) *and* Goss v. Illinois, 312 F.2d 257, 259 (7th Cir. 1963). Some commentators opposed to 42 U.S.C. § 1983 (1970) as an exception were: Bailey, *Enjoining State Criminal Prosecutions which Abridge First Amendment Freedoms*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 67 (1967); Comment, *The Federal Anti-Injunction Statute in the Aftermath of Atlantic Coastline Railroad*, 5 GA. L. REV. 294 (1971); Note, *The Dombrowski Remedy: Federal Injunctions Against State Court Proceedings Violative of Constitutional Rights*, 21 RUTGERS L. REV. 92 (1966). Some commentators in favor of 42 U.S.C. § 1983 (1970) as an exception were: Maraist, *supra* note 14; Note, *supra* note 28; Note, *Incompatibility—the Touchstone of Section 2283's Express Authorization Exception*, 50 VA. L. REV. 1404 (1964).

[48] 407 U.S. 225, 243 (1972), *noted in* 58 A.B.A.J. 1244 (1972); 27 U. MIAMI L. REV. 208 (1973); 18 VILL. L. REV. 509 (1973); *and* 1972 WASH. U.L.Q. 782. That 42 U.S.C. § 1983 (1970) was an authorized exception was the position Justice Douglas had previously taken. Younger v. Harris, 401 U.S. 37, 62 (1971)(dissenting opinion).

[49] 407 U.S. at 243.

[50] 415 U.S. 452 (1974), *noted in* 24 CATH. U.L. REV. 145 (1974); 5 MEMPHIS ST. L. REV. 115 (1974); *and* 42 U. CIN. L. REV. 655 (1974); *see The Supreme Court, 1973 Term*, 88 HARV. L. REV. 43, 203 (1974); Comment, *supra* note 35, at 522. The federal plaintiff in *Steffel* had broken the law and could have been prosecuted, but was only threatened with prosecution. 415 U.S. at 455-56.

[51] 95 S. Ct. 2561 (1975), *noted in* 9 GA. L. REV. 511 (1975). Three night club owners filed an action in federal court seeking a temporary restraining order and preliminary injunction against enforcement of a newly enacted "anti-topless" ordinance. After the temporary restraining order was denied, one of the plaintiffs violated the statute and was

the Court had expressly refrained from deciding whether the *Younger* prerequisites of bad faith harassment or other unusual circumstances would also apply to *threatened* prosecutions.[52] In *Steffel*, the Court held that when no state criminal prosecution was pending[53] against the federal plaintiff on the day his federal complaint was filed, declaratory relief would be available without regard to *Younger*.[54] The Court reasoned that when a prosecution is threatened but not pending, the availability of declaratory relief should be considered independently of injunctive relief, noting that the only time the difference between declaratory and injunctive relief had been disregarded was when intervention in the class of litigation was precluded altogether by federal policy.[55] The *Younger* prerequisites were inapplicable because when no state proceedings were pending, the principles of equity, comity, and federalism do not prevent federal intervention.[56] Otherwise, as the Court stated in *Steffel*, the federal plaintiff

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prosecuted by the state. 95 S. Ct. at 2564-65. As to this plaintiff, the federal court action was dismissed because his request for relief was held to be governed by *Younger*. *Id.* at 2566-67. The other two plaintiffs in question had not violated the statute until after a preliminary injunction was issued, so their request for relief was not governed by *Younger*, but by *Steffel*. *Id.* at 2567-68. *Salem Inn* was decided 6 days after the instant case.

[52] This question in relation to both declaratory and injunctive relief was reserved in *Younger* and *Samuels*. Samuels v. Mackell, 401 U.S. 66, 73-74 (1971); Younger v. Harris, 401 U.S. 37, 41 (1971). After *Steffel*, the Court continued to avoid deciding if *Younger* standards applied to injunctive relief against threatened prosecutions. *E.g.*, Allee v. Medrano, 416 U.S. 802, 820 n.15 (1974). Several lower courts held that *Younger* did apply to threatened prosecutions. Sandquist v. Pitchess, 332 F. Supp. 171 (C.D. Cal. 1971) (dictum); Landreth v. Hopkins, 331 F. Supp. 920 (N.D. Fla. 1971); Planned Parenthood Ass'n v. Nelson, 327 F. Supp. 1290, 1292-93 (D. Ariz. 1971); Lewis v. Kugler, 324 F. Supp. 1220, 1224 (D.N.J.), *vacated and remanded*, 446 F. 2d 1343 (3d Cir. 1971), *aff'd*, 478 F.2d 1398 (3d Cir. 1971). *Contra*, Hogge v. Members of the City Council, 482 F.2d 575, 578 (4th Cir. 1973); Marks v. City of Newport, 344 F. Supp. 675 (E.D. Ky. 1972); Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738, 741 (E.D. Mich. 1972); Maldonado v. County of Monterey, 330 F. Supp. 1282 (N.D. Cal. 1971).

[53] A pending prosecution seemed to be one instituted before the federal complaint was filed. *See* Steffel v. Thompson, 415 U.S. 452, 454 (1974); Note, *Federal Injunctions Against State Prosecution—Comity—Pending State Proceedings Which Bar Federal Relief*, 1972 Wis. L. Rev. 257, 262-68. However, Justice Brennan had previously indicated that he thought the availability of relief should depend on the situation at the time of the federal hearing rather than the situation when the federal complaint was filed. Perez v. Ledesma, 401 U.S. 82, 103 (1971); *accord*, Modern Social Educ., Inc. v. Preller, 353 F. Supp. 173, 180 (D. Md. 1973), *modified*, 512 F.2d 1241 (3d Cir. 1975).

[54] Steffel v. Thompson, 415 U.S. 452, 475 (1974); *accord*, Lake Carriers Ass'n v. McMullan, 406 U.S. 498, 509 (1972) (dictum).

[55] Steffel v. Thompson, 415 U.S. 452, 463-72 (1974); *accord*, Perez v. Ledesma, 401 U.S. 82, 115 (1971) (Brennan, J., concurring in part and dissenting in part).

[56] Steffel v. Thompson, 415 U.S. 452, 472 (1974); *accord*, Wulp v. Corcoran, 454 F.2d 826 (1st Cir. 1972); Poe v. Menghini, 339 F. Supp. 986 (D. Kan. 1972); Cantrell v. Folsom, 332 F. Supp. 767 (M.D. Fla. 1971); Anderson v. Vaughn, 327 F. Supp. 101 (D. Conn. 1971); *cf.* Lake Carriers Ass'n v. McMullan, 406 U.S. 498, 509 (1972) (dictum).

The Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970), provides that, if necessary, further relief may be available to enforce a declaratory judgment. The Court has not

without a state forum would be placed "between the Scylla of intentionally flouting state law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding."[57] Similarly, in *Salem Inn*, the Court held that absent a pending state prosecution, preliminary injunctive relief would not be subject to *Younger* restrictions.[58] Thus by limiting *Younger* to pending actions, the threshold determination of pendency of the action has become a crucial factor in the availability of federal relief. The Court has recently imbued *Younger* with potentially far-reaching effects. In *Huffman v. Pursue, Ltd.*,[59] the Court extended *Younger* to state court civil proceedings "in aid of and closely related to criminal statutes."[60] Although the Court found it unnecessary to hold *Younger* applicable to all civil litigation, the implications of the Court's reasoning presage such a result.[61] Chief Justice Burger's separate opinion in *Alee v. Medrano*[62] portended a further extension of *Younger* restrictions. It was his position that *Younger* should apply to a federal plaintiff if a party with closely associated interests is already a defendant in a pending state prosecution.[63]

In the instant case the Court first found that both the declaratory judgment and the injunction were properly before the court on appeal[64] and then examined

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yet decided what standards must be met before a declaratory judgment could support the issuance of an injunction. Steffel v. Thompson, 415 U.S. 452, 479-81 (1974) (Rehnquist, J., concurring).

[57] Steffel v. Thompson, 415 U.S. 452, 462 (1974). This dilemma is precisely what *Ex parte Young* and the Declaratory Judgment Act sought to obviate. Perez v. Ledesma, 401 U.S. 82, 114 (1971); *Ex parte* Young, 209 U.S. 123, 147-48, 163-65 (1908).

[58] Doran v. Salem Inn, Inc., 95 S. Ct. 2561, 2567 (1975); *accord*, Hogge v. Members of the City Council, 482 F.2d 575, 578 (4th Cir. 1973), *cert. denied*, 416 U.S. 955 (1975); Marks v. City of Newport, 344 F. Supp. 675 (E.D. Ky. 1972); Mitchell Family Planning, Inc. v. City of Royal Oak, 335 F. Supp. 738, 741 (E.D. Mich. 1972); Maldonado v. County of Monterey, 330 F. Supp. 1282, 1284 (N.D. Cal. 1971). The Court stated that, under *Steffel*, declaratory relief was undoubtedly available; since the practical effect of declaratory and injunctive relief is the same, preliminary injunctive relief would not be governed by *Younger* standards. Doran v. Salem Inn, Inc., *supra* at 2567. See note 42 and accompanying text *supra*.

[59] 420 U.S. 592 (1975).

[60] Huffman v. Pursue, Ltd., 420 U.S. 592, 604, 607, 613 (1975); *accord*, Duke v. Texas, 477 F.2d 244 (5th Cir. 1973), *cert. denied*, 416 U.S. 955 (1975); Palaio v. McAuliffe, 466 F.2d 1230 (5th Cir. 1972); *cf.* Lynch v. Snepp, 472 F.2d 769 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1975).

[61] The Court stated: "The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding." Huffman v. Pursue, Ltd., 420 U.S. 592, 604 (1975). The Court, however, found it unnecessary in *Huffman* to make any "general pronouncements upon the applicability of *Younger* to all civil litigation." *Id.* at 607; *see* Lynch v. Household Fin. Corp., 405 U.S. 538, 561 (1972) (White, J., dissenting). *But see* Joiner v. City of Dallas, 480 F.2d 998, 1001-02 (5th Cir. 1973); Polk v. State Bar of Tex., 380 F. Supp. 754, 758-60 (N.D. Tex. 1974).

[62] 416 U.S. 802 (1974).

[63] *Id.* at 830-32.

[64] Hicks v. Miranda, 95 S. Ct. 2281, 2288-91(1975).

the propriety of that relief. Reasoning that the appellees had a substantial stake in the initial state proceedings against their employees and could present their federal claims in state court while seeking return of their property, the Court concluded that comity considerations could not be avoided simply because the appellees were not defendants in the state prosecution at the time their federal complaint was filed.[65] The Court emphasized that no case had held that a state suit must be actually in progress when the federal action is filed, before considerations of comity apply to prevent unnecessary federal interference in state affairs.[66] The Court thus concluded that when state proceedings against the federal plaintiff are begun after the federal complaint has been filed but before any proceedings of substance on the merits have taken place in federal court, *Younger* restrictions are fully applicable.[67] The Court then found that since the appellees failed to demonstrate bad faith and harassment or other unusual circumstances entitling them to relief under *Younger*, the district court had erroneously granted declaratory and injunctive relief.[68]

In a piercing dissent, Justice Stewart attacked the majority opinion by concluding that the present holding effectively preempted the federal courts' historic role as the primary guardians of federal constitutional rights.[69] He reasoned that principles of equity, comity, and federalism do not militate against a federal action to declare a state criminal statute unconstitutional if a state prosecution is not pending when the federal action is filed.[70] Indeed, he found that the majority by holding otherwise had "trivialized" *Steffel*.[71] He concluded that although the very purpose of the statute under which the action was brought was to "interpose the federal courts between the States and the people," the majority opinion enabled the state to file a criminal charge in order to defeat federal jurisdiction and thereby secure dismissal of the federal action.[72]

Until the instant decision, *Steffel* appeared to hold that pendency of a state prosecution would be determined by the situation on the day the federal action was filed.[73] The instant case redefines a pending prosecution in two ways. First, a state prosecution is pending when instituted prior to any federal proceedings of substance on the merits. Second, a state prosecution against a party having a substantial, intertwined interest with the federal plaintiff will constitute a pending prosecution subjecting the federal action to *Younger* standards. Despite a contrary implication in *Steffel*, the Court insisted that it was not redefining "pending" because no case had defined it otherwise.[74] Yet under the instant definition, a state prosecutor can now create a pending action requiring dismissal under *Younger* simply by filing an action against the federal plaintiff

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[65] *Id.* at 2291-92.
[66] *Id.* at 2292.
[67] *Id.*
[68] *Id.* at 2292-93.
[69] *Id.* at 2295. (Stewart, J., dissenting).
[70] *Id.* at 2294.
[71] *Id.* See note 53 *supra*.
[72] 95 S. Ct. at 2294-96.
[73] See note 53 *supra*.
[74] 95 S. Ct. at 2292.

prior to federal proceedings of substance on the merits. Although the decision does not expressly so hold, the same result would seemingly be reached if prior to federal proceedings of substance on the merits, a state action was filed against a party whose interests were intertwined with those of the federal plaintiff. The impact of this definition is to place state prosecutors in a position to control a wide range of federal court suits challenging the propriety of state prosecutorial actions. This results in the effective preemption of the federal courts as guarantors of federal constitutional rights through section 1983 actions except in the remaining limited situations when a state action will not be pending. Federal relief in a *Steffel* situation will rarely if ever be available again: once a plaintiff files his federal action, a state prosecution can and likely will be instituted to preempt the federal action. Relief for a plaintiff in a *Steffel* situation is now limited to cases in which there are no grounds for prosecution against the federal plaintiff or a party closely intertwined with him. Illustrative is the *Salem Inn*[75] case decided 6 days after *Hicks*. Of the three original plaintiffs threatened with state prosecution who filed together in federal court, one of them violated the law after being denied a temporary restraining order but before the issuance of a preliminary injunction and was promptly prosecuted.[76] Under *Steffel* the state prosecution instituted subsequent to the federal filing would not have been a pending suit invoking *Younger* restrictions. The Court in *Salem Inn*, however, held that the prosecution initiated prior to the issuance of the preliminary injunction was a pending suit and the availability of federal relief was squarely governed by *Younger*.[77] Yet the other two plaintiffs, not subject to state prosecution prior to the issuance of the preliminary injunction, and not intertwined with the prosecuted plaintiff were entitled to relief under *Steffel*.[78] Another situation in which *Younger* will not apply is when federal proceedings of substance on the merits have taken place before the state action was instituted. But what are "proceedings of substance on the merits"? This is seemingly a two-prong test—that proceedings must be not only "on the merits" but also "of substance."[79] Justice Stewart pointed out that this new standard might cause months of expensive and time consuming discovery activity to become an exercise in futility simply because no question was presented on the merits.[80] Similarly, what of time spent in determinations of standing? Evidently the denial of a temporary restraining order is insufficient to meet the test.[81] Thus, we can assume that if lapsing, the prior issuance of a temporary restraining order would also not meet the test. Hearings on a preliminary injunction should be treated differently and there should be no requirement that an appealable decree be rendered. In addition, it would seem that when the trier of fact began to hear evidence on the merits the test would be satisfied. Guidelines for determination of this question are unfortunately unclear. Of more importance, however, the

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[75] Doran v. Salem Inn, Inc., 95 S. Ct. 2561 (1975).

[76] See note 51 *supra*.

[77] *Id.*

[78] *Id.*

[79] 95 S. Ct. at 2294 n.1.

[80] *Id.*

[81] *Id.* See note 51 *supra*.

instant decision makes this issue of questionable importance at the same time it creates it. A state prosecutor, when served with process from the federal court, will likely respond with a state prosecution immediately if he desires to prosecute at all. The facially important issue of when proceedings of substance on the merits are reached thus may seldom be presented.

The Court has continued even further to limit the federal courts' powers while expanding the reach of *Younger* and its progeny. The Court's recent decision in *Huffman v. Pursue, Ltd.*, portends that *Younger* will apply to purely civil cases.[82] The decisions since *Younger* create a formalistic federalism based on the assumption that state courts have matured since the 1960's into viable guardians of federal constitutional rights. Perhaps this revised perception of the state courts has emerged from a need to reduce the caseload of the federal courts. Whatever the reason may be, the Court has carefully structured a symmetrical framework for the availability of federal relief which, at best, revolves around the pivotal determination of whether a state action is pending before federal proceedings of substance on the merits have begun. In doing so, the Court has produced a lopsided balance of interests which may result in substantial impairment of constitutional rights while virtually hobbling the ability of the federal courts to grant relief.

Sue Esther Bryant Dulin

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[82] See note 61 *supra*.

FEDERAL JURISDICTION—IMPLIED CAUSE OF ACTION—NO PRIVATE REMEDY AVAILABLE UNDER FEDERAL ELECTION CAMPAIGN ACT

Plaintiff stockholder brought suit[1] individually and derivatively on behalf of Bethlehem Steel Corporation seeking injunctive relief and damages[2] for alleged violations[3] of the Federal Election Campaign Act,[4] a federal criminal statute prohibiting corporate political expenditures. Although the statute was penal in nature, imposing a fine and penalty,[5] plaintiff contended that it "implied" a private cause of action. Defendants argued, *inter alia*, that the criminal penalties provided were exclusive. In an unreported opinion, the United States District Court for the Eastern District of Pennsylvania granted defendant's motion for summary judgment. On appeal, the United States Court of Appeals for the Third Circuit reversed,[6] finding that "allowance of a private cause of action, whether brought by a citizen to secure injunctive relief or by a stockholder to secure injunctive or derivative damage relief, [was] proper to remedy violation

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[1] Count I alleged jurisdiction under 28 U.S.C. § 1331 (1970) and purported to state a private cause of action under 18 U.S.C. § 610 (1970), *as amended*, (Supp. II, 1972), which provides in part:

> It is unlawful for any . . . corporation . . . to make a contribution or expenditure in connection with any election to any political office . . . or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice-Presidential electors . . . are to be voted for . . . .

Count II , invoking pendent jurisdiction, alleged that certain corporate political expenditures were "ultra vires, unlawful and [a] willful, wanton and gross breach of [defendant's] duty to [Bethlehem]." Rather than posting $135,000 security, as ordered by the district court, plaintiff deleted the state cause of action by amending his complaint. Cort v. Ash, 95 S. Ct. 2080, 2084-85 (1975).

[2] Earlier, the district court denied plaintiff's application for preliminary injunction based on his failure to establish that refusal to grant injunctive relief would result in irreparable harm. Ash v. Cort, 350 F. Supp. 227 (E.D. Pa. 1972), *aff'd per curiam*, 471 F.2d 811 (3d Cir. 1973), *on remand* Civil No. 72-1925 (E.D. Pa.), *rev'd*, 496 F.2d 416 (3d Cir. 1974), *rev'd*, 95 S. Ct. 2080 (1975).

Plaintiff sought damages only derivatively as a stockholder.

[3] Defendant Stewart S. Cort, chairman of Bethlehem Steel Corporation, and others allegedly expended general corporate funds to purchase a political advertisement entitled: "I say let's keep the campaign honest. Mobilize 'truth squads' . . . ," in an assortment of national periodicals and in 19 local newspapers in towns where Bethlehem had plants. A copy of the ad was included in the September 11, 1972, mailing of quarterly dividends to stockholders. 350 F. Supp. at 229.

Although no particular candidate was named, the complaint alleged the ad clearly referred to Democratic presidential nominee George McGovern. 95 S. Ct. at 2084 n.2.

[4] 18 U.S.C. §§ 591 *et seq.* (1970), *as amended*, (Supp. IV, 1974).

[5] Under the act, a corporation could be fined a maximum of $5,000 for a violation. Corporate officers could be fined up to $1,000 or imprisoned for 1 year for consenting to a violation. Willful violations were punishable by a $10,000 fine or imprisonment for 2 years, or both. 95 S. Ct. at 1083 n.2.

[6] 496 F.2d 416 (3d Cir. 1974).

of section 610."[7] On writ of certiorari to the United States Supreme Court, *held*, reversed. Since a private remedy is not expressly provided for in the statute and considering that: (1) plaintiff is not a member of the class for whose especial benefit the statute was enacted; (2) there is no legislative intent to create a private remedy; (3) implication of a private remedy would not effectuate the underlying legislative purpose; and (4) the cause of action is one traditionally relegated to state law, a private action is not available under the Federal Election Campaign Act. *Cort v. Ash*, 95 S. Ct. 2080 (1975).

While the implication doctrine[8] has some precedent in English law,[9] its initial application in the United States came in *Texas & Pacific Ry. v. Rigsby*.[10] In *Rigsby*, plaintiff[11] brought an action for damages based upon the Federal Safety Appliance Act.[12] The Supreme Court acknowledged the absence of any express language in the Act conferring a personal remedy but found "inference of a private right of action . . . irresistable."[13] Making, in essence, a tort analysis,[14] the Court declared that "disregard of the command of the statute is a

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[7] *Id.* at 424. The Third Circuit found no reasonably clear evidence of legislative intent to create or deny a private action under section 610. *Id.* at 421. In addition, the court determined that plaintiff, both as a stockholder and voter, was within the classes Congress intended to protect and that effective enforcement by the government alone was unlikely. *Id.* at 422.

Subsequent to the Third Circuit's ruling, the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-943, 93d Cong., 2d Sess. (1974) [Amendments] (codified in scattered sections of 18 U.S.C.) were passed. The amendments created a Federal Election Commission and established an administrative procedure for processing complaints of alleged violations of section 610. In reversing the Third Circuit, the Supreme Court, in the instant decision, held that the amendments constituted an intervening law, requiring submission of any complaint for injunctive relief to the Commission. 95 S. Ct. at 2087, *citing* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

[8] An implied cause of action has been defined as "the extension of a civil remedy to one injured by another's breach of a statute or regulation not providing for such relief." Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963). For a general discussion of the doctrine, see H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 798-896 (2d ed. 1973); Comment, *Federal Jurisdiction in Suits for Damages Under Statutes Not Affording Such Remedy*, 48 COLUM. L. REV. 1090 (1948).

[9] *E.g.*, Couch v. Steel, 118 Eng. Rep. 1193 (K.B. 1854).

[10] 241 U.S. 33 (1916).

[11] Plaintiff was employed by the Texas & Pacific Railway as a switchman and was injured when a defective handhold broke, causing him to fall. *Id.* at 36.

[12] Act of April 14, 1910, ch. 160, §§ 1-6, 36 Stat. 298, *as amended*, 45 U.S.C. §§ 11-16 (1970). Specifically, plaintiff's suit alleged violation of section 2 of the act, requiring secure handholds on all railroad cars equipped with ladders. 241 U.S. at 37.

[13] 241 U.S. at 40.

[14] *Accord*, Neiswonger v. Goodyear Tire & Rubber Co., 35 F.2d 761 (N.D. Ohio 1929) (implied remedy granted for violation of Air Commerce Act of 1926). *See generally* W. PROSSER, THE LAW OF TORTS § 36, at 192-95 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 286 (1965).

A private action may not be implied from a statute enacted to protect the public as a whole. *Id.* § 288. *But see* Bivens v. Six Unknown Named Fed. Narcotics Agents, 403

wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied . . . ."[15]

Since its threshold decision in *Rigsby*, the Supreme Court has applied the "implied remedies" theory to a wide range of statutes involving such areas as voting rights,[16] a rivers and harbors act,[17] securities,[18] and railway labor legislation.[19] The power to grant this remedy has been found to be implied from the statute,[20] or to exist under undefined general principles of law.[21] The propriety of implication under federal statutes or regulations seemingly has been resolved on an ad hoc basis, implementing one or more of a variety of tests, including: (1) congressional intent,[22] as evidenced by statutory language or legislative history; (2) the impact of implication on the purposes of the legislation;[23] and (3) the adequacy of other available remedies.[24] The Supreme Court, in *J. I. Case Co. v. Borak*,[25] placed a premium on the presence of specific language in the

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U.S. 388 (1971) (fourth amendment); Common Cause v. Democratic Nat'l Comm, 333 F. Supp. 803 (D.D.C. 1971) (Corrupt Practices Act).

[15] 241 U.S. at 39. The Federal Safety Appliance Act is no longer held to provide a basis for an implied cause of action. *See* Moore v. Chesapeake & O. Ry., 291 U.S. 205 (1934); Jacobson v. New York, N.H. & H.R.R., 206 F.2d 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

[16] Allen v. State Bd. of Electors, 393 U.S. 544 (1969).

[17] Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967); United States v. Republic Steel Corp., 362 U.S. 482 (1960).

[18] J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Deckert v. Independence Shares Corp., 311 U.S. 282 (1940).

[19] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944); Texas & N.O.R.R. v. Brotherhood of Ry. & S.S. Clerks, 281 U.S. 548 (1930).

[20] *See, e.g.*, Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) (Railway Labor Act); Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947) (Communications Act of 1934); Goldstein v. Groesback, 142 F.2d 422, 426-27 (2d Cir. 1944) (Public Utility Holding Company Act of 1935).

[21] *E.g.*, Kardon v. National Gypsum Co., 69 F. Supp. 512, 514 (E.D. Pa. 1946) ("[I]n view of the general purpose of the Act, the mere omission of an express provision for civil liability is not sufficient to negative what the general law implies."); *accord*, Hooper v. Mountain States Sec. Corp., 282 F.2d 195, 201 (5th Cir. 1960); Fratt v. Robinson, 203 F.2d 627, 631 (9th Cir. 1953).

[22] *See, e.g.*, National R.R. Passenger Corp. v. National Ass'n of Ry. Passengers, 414 U.S. 453 (1974) (Amtrak Act); Deckert v. Independence Shares Corp., 311 U.S. 282, 287 (1940) (Securities Act of 1933); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 989 (D.C. Cir. 1973) (Federal Trade Commission Act).

[23] J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (Securities Exchange Act of 1934); Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967) (Rivers & Harbors Appropriation Act of 1899); Wills v. Trans World Airlines, Inc., 200 F. Supp. 360, 365 (S.D. Cal. 1961) (Civil Aeronautics Act).

[24] Allen v. State Bd. of Electors, 393 U.S. 544, 556-57 (1969) (Voting Rights Act); Stewart v. Travelers Corp., 503 F.2d 103, 110-11 (9th Cir. 1974) (Consumer Credit Protection Act); Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969).

[25] 377 U.S. 426 (1964).

Securities Exchange Act[26] to imply a private cause of action for violation[27] of its provisions. Noting that section 27 of the Act granted "[t]he district courts . . . exclusive jurisdiction . . . of all *suits in equity and actions at law* brought to enforce any liability or duty created by this chapter,"[28] the Court found it "clear that private parties have a right . . . to bring suit . . . ."[29] In contrast to *Borak*, specific language in the Rail Passenger Service Act[30] moved the Court to deny a private action in *National R.R. Passenger Corp. v. National Association of R.R. Passengers* (Amtrak).[31] Both *Borak* and *Amtrak* were ostensibly statutory construction cases. Indeed, the *Amtrak* opinion made specific reference to the ancient maxim *expressio unius est exclusio alterius*[32] which often has been invoked by the courts to conclude that the remedial language of a particular statute is exclusive, thereby precluding an implied remedy.[33] A corollary source of congressional intent has been the legislative history of an act. For example, in *T.I.M.E., Inc. v. United States*,[34] the Court found evidence from Senate hearings that Congress considered and rejected a cause of action on behalf of motor carrier shippers for recovery of past unreasonable transportation rates[35] and concluded

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[26] Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1970).

[27] Respondent stockholder charged J.I. Case Company with utilization of a false and misleading proxy statement to effect a corporate merger, allegedly in violation of section 14 (a) of the Act, 15 U.S.C. § 78n(a) (1970).

[28] 15 U.S.C. § 78aa (1970) (emphasis added).

[29] 377 U.S. at 430-31. *See also* Farmland Indus., Inc. v. Kansas-Neb. Natural Gas Co., 486 F.2d 315, 317 (8th Cir. 1973) (in the absence of contrary legislative history, plain meaning of statutory language is controlling). Securities legislation has been a bountiful source of "implied remedy" litigation. *See, e.g.*, Deckert v. Independence Shares Corp., 311 U.S. 282 (1940) (Securities Act of 1933); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Errion v. Connell, 236 F.2d 447 (9th Cir. 1956); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951) (Securities Exchange Act of 1934).

[30] 45 U.S.C. §§ 501 *et seq.* (1970). 45 U.S.C. § 547(a) (1970) provides:

> If the corporation or any railroad engages in or adheres to any action . . . inconsistent with the . . . purposes of this chapter . . . the district court of the United States . . . shall have jurisdiction . . . upon petition of the Attorney General . . . or, *in a case involving a labor agreement, upon petition of any employee affected thereby* . . . . (emphasis added)

[31] 414 U.S. 453 (1974). The Court concluded, *inter alia*, that in light of the language of section 307(a), private causes of action were limited to "a case involving a labor agreement." *Id.* at 457. *See generally* Gerbing v. I.T.T. Rayonier, Inc., 332 F. Supp. 309 (M.D. Fla. 1971) (Rivers and Harbors Appropriation Act of 1899).

[32] 414 U.S. at 453 (Expression of one thing is the exclusion of another.); *see* Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") *See generally* Note, *supra* note 7, at 290.

[33] *See, e.g.*, T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) (Motor Carrier Act of 1935); Martinez v. Behring's Bearings Serv. Inc., 501 F.2d 104 (5th Cir. 1974); *cf.* Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 376 (1958). *But see* Stewart v. Travelers Corp., 503 F.2d 108, 111 (9th Cir. 1974) (stating that the current trend is to limit application of the maxim).

[34] 359 U.S. 464 (1959) (construing the Motor Carrier Act of 1953).

[35] *Id.* at 477, *citing Hearings on S. 1194 Before Senate Committee on Interstate and*

that "Congress did not intend to give shippers a statutory cause of action . . . ."[36] The courts have been particularly alert to provide private remedies where necessary to effectuate the legislative purpose of a statute. The Supreme Court did so in *Borak*[37] and reaffirmed their position when considering application of the Voting Rights Act[38] in *Allen v. State Board of Elections*.[39] Conversely, the decisions indicate that if the effect will be to defeat congressional purpose, a private remedy will be denied.[40] Where criminal penalties, stipulated for violation of a federal statute creating a federal right, have proven insufficient to protect the interests of the plaintiff, an implied action has been found a necessary supplement. In *Wyandotte Transportation Co. v. United States*,[41] the government sought reimbursement of expenditures for removal of two vessels negligently sunk in navigable waters. The Rivers and Harbors Appropriation Act of 1899 authorized the removal and prescribed criminal penalties for their sinking[42] but failed expressly to provide for reimbursement. The Court implied a remedy, finding the inadequacy of the criminal penalties "beyond dispute" and "hardly a satisfactory remedy for the pecuniary injury which the negligent shipowner

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Foreign Commerce, 80th Cong., 2d Sess., 1, 5, 11-12 (1937); *Hearings on S. 378 Before Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess., 3, 12 (1947).

[36] 359 U.S. at 470; *see* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (evidence of congressional rejection of private remedy for violation of Amtrak Act). *See also* Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973) (analysis of legislative history of Federal Trade Commission Act in denying private remedy for its violation); Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir.), *cert. denied*, 409 U.S. 1042 (1972) (no evidence in legislative history of Farm Labor Contractor Registration Act to support civil remedy).

[37] 377 U.S. 426, 432 (1964) ("While this language makes no specific reference to a private right of action, among its chief purposes is 'the protection of investors,' which certainly implies the availability of judicial relief where necessary to achieve that result.").

[38] 42 U.S.C. §§ 1973 *et seq.* (Supp. I, 1964).

[39] 393 U.S. 544 (1969). The Court noted that the purpose of the Voting Rights Act was "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens," *citing* South Carolina v. Katzenbach, 383 U.S. 301, 308-09 (1966), and that this purpose could be frustrated in the absence of private remedies. 393 U.S. at 556.

[40] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 463-64 (1974) (allowance of private actions would "completely undercut the efficient apparatus that Congress sought to provide"); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 998-99 (D.C. Cir. 1973). (Private enforcement of Federal Trade Commission Act would be inconsistent with the legislative purpose.)

[41] 389 U.S. 191 (1967).

[42] 33 U.S.C. § 409 (1970) made it unlawful to sink negligently a vessel in navigable waters and recognized the right of the United States to remove it where the owner failed to do so immediately.

33 U.S.C. § 411 (1970) made violation a misdemeanor, punishable "by a fine not exceeding $2,500 nor less that $500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court . . . ."

may inflict."[43] Similarly, the total absence of federal remedial authority has prompted implication of a private remedy. Petitioner in *Bivens v. Six Unknown Named Federal Narcotics Agents*[44] alleged that federal narcotics officers violated his fourth amendment rights[45] and sought $15,000 damages from each agent. The Court characterized as ineffective an action at state law[46] and held that petitioner's constitutionally guaranteed interests could be adequately protected only by implying a private remedy in his favor.[47] Lower courts accordingly have implied private actions where statutory remedies were grossly inadequate[48] or nonexistent.[49] Consistent with the bases for implication under criminal statutes, private remedies have been recognized where administrative remedies were inadequate[50] or where administrative proceedings were insufficient to provide the full remedy sought.[51]

While finding an implied action otherwise proper, the federal judiciary has been hesitant to intrude into the prosecutorial or regulatory domain of another

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[43] 389 U.S. at 202. The Court concluded that without a private remedy "the Government would be subject to a financial penalty for the correct performance of its duty." *Id.* at 205; *see* United States v. Republic Steel Corp., 362 U.S. 482 (1960); *cf.* Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 813 (D.D.C. 1971) (inadequacy of criminal penalties provided by Corrupt Practices Act).

[44] 403 U.S. 388 (1971), *noted in* 50 TEXAS L. REV. 816 (1972).

[45] Petitioner's complaint charged that respondent agents searched his house without a warrant and arrested him without probable cause. 403 U.S. at 389.

[46] *Id.* at 394 ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee . . . may be inconsistent or even hostile."); *cf.* Gomez v. Florida State Employment Serv., 417 F.2d 569, 576 (5th Cir. 1969) (civil suits under local concepts insufficient to effectuate purposes of Wagner-Peyser Act). *But cf.* Rogers v. Ray Gardner Flying Serv., Inc., 435 F.2d 1389, 1394 (5th Cir. 1970), *cert. denied*, 402 U.S. 1010 (1971) (tort law traditionally a matter of state concern).

[47] 403 U.S. at 396. *See also* Bell v. Hood, 327 U.S. 678 (1946).

[48] *E.g.*, Gomez v. Florida State Employment Serv., 417 F.2d 569, 576 (5th Cir. 1969) (only remedy available was termination of federal funds); *accord*, Galindo v. Del Monte Corp., 382 F. Supp. 464 (N.D. Ill. 1974). *See generally* Drew v. Liberty Mut. Ins. Co., 480 F.2d 69 (5th Cir. 1973), *cert. denied*, 471 U.S. 935 (1974) (private action pending EEOC suit); Yanez v. Jones, 361 F. Supp. 701 (D. Utah 1973) (suit by Medicaid recipients under Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 *et seq.* (1970), *as amended*, (Supp. III, 1973)).

[49] *E.g.*, Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970); Gabel v. Hughes Air Corp., 350 F. Supp. 612 (C.D. Cal. 1972) (suit for violation of Federal Aviation Act). *Contra*, McCord v. Dixie Aviation Corp., 450 F.2d 1129 (10th Cir. 1971).

[50] *E.g.*, Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210, 213 (1944) (petitioner without administrative relief under Railway Labor Act); Gomez v. Florida State Employment Serv., 417 F.2d 569, 576 (5th Cir. 1969).

[51] *E.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192, 205 (1944). *Compare* Fitzgerald v. Pan Am. World Airlines, Inc., 229 F.2d 499 (2d Cir. 1956) (suit alleging racial discrimination in violation of Civil Aeronautics Act), *with* Willis v. Trans World Airlines, Inc., 200 F. Supp. 360 (S.D. Cal. 1961) (action for damages under Civil Aeronautics Act where plaintiff removed from oversold flight). *But cf.* Rogers v. Ray Gardner Flying Serv. Inc., 435 F.2d 1389 (5th Cir. 1970), *cert. denied*, 402 U.S. 1010 (1971).

branch of government. Consequently, where adequate remedial powers have been specifically vested in a federal officer or agency[52] or where a comprehensive enforcement scheme has been provided,[53] private remedies have been denied. The Supreme Court's most recent opportunity to employ the implication doctrine came in *Securities Investor Protection Corp. v. Barbour*.[54] There a brokerage customer brought suit to compel action under the Securities Investor Protection Act.[55] Applying familiar considerations of legislative intent,[56] congressional purpose,[57] and the adequacy of statutory remedies,[58] the Court found "[a]s in *Amtrak*, a private right of action under the Act would be consistent neither with the legislative intent, nor with the effectuation of the purposes it intended to serve."[59] The ad hoc approach of the Supreme Court has pervaded lower court decisions resulting in diverse treatment of the implied remedy question.[60]

In the instant case, a unanimous Court detailed the legislative history of section 610, finding its primary purpose to be the negation of corporate influence over elections through political contributions.[61] Since respondent's derivative action was based on a subsidiary purpose—the protection of stockholders from

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[52] *See* National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974) (private suit under Amtrak Act vested in Attorney General); Carlson v. Coca-Cola Co., 483 F.2d 279 (9th Cir. 1973) (remedial power for violation of Federal Trade Commission Act vested in FTC); Intracoastal Transp., Inc. v. Decatur County, 482 F.2d 361 (5th Cir. 1973) (enforcement of Bridge Act vested in Attorney General); *cf.* Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894 (10th Cir. 1972). (Secretary of Labor granted express authority to enforce Immigration & Nationality Act.) *But cf.* Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803, 813 (D.D.C. 1971). *See generally* Note, *supra* note 8, at 294-96.

[53] *See, e.g.*, Jeter v. St. Regis Paper Co., 507 F.2d 973, 977 (5th Cir. 1975) (enforcement provisions of Occupational Safety & Health Act sufficiently comprehensive to negate the need for a private cause of action); *accord*, Russell v. Bartley, 494 F.2d 334 (6th Cir. 1974); Martinez v. Behring's Bearings Serv., Inc., 501 F.2d 104, 105 (5th Cir. 1974) (comprehensive penalties provided by Fair Labor Standards Act); Breitwiester v. KMS Indus., Inc., 467 F.2d 1391, 1392 (5th Cir. 1972), *cert. denied*, 410 U.S. 969 (1973). *Contra*, Fagot v. Flintkote Co., 305 F. Supp. 407 (E.D. La. 1969) (implying private remedy under Fair Labor Standards Act). *See generally* Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951).

[54] 421 U.S. 412 (1975).

[55] 15 U.S.C. §§ 78aaa *et seq.* (1970).

[56] 421 U.S. at 418-20.

[57] *Id.* at 421.

[58] *Id.* at 425.

[59] *Id.* at 424.

[60] *Compare* Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947), *with* Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969), *and* Farmland Indus., Inc. v. Kansas-Neb. Natural Gas Co., 486 F.2d 315 (8th Cir. 1973). For a good example of stringent application of prerequisite for allowance of an implied remedy, see Holloway v. Bristol-Myers Corp., 485 F.2d 986 (D.C. Cir. 1973).

[61] 95 S. Ct. at 2089, *citing* United States v. CIO, 335 U.S. 106, 113 (1948). *See generally* E. EPSTEIN, CORPORATIONS, CONTRIBUTIONS, AND POLITICAL CAMPAIGNS: FEDERAL REGULATIONS IN PERSPECTIVE 11-14 (1968).

use of their invested funds for political purposes—the Court found no federal right established by the statute in his favor.[62] The Court thus reasoned that the relation between corporations and their stockholders should remain a state law concern.[63] As to recovery of derivative damages, since no deterrent against corporate political contributions would result from the award, the remedy sought was declared ineffective to promote the primary purpose of section 610.[64] The Court finally concluded that since corporations were "creatures of state law" and since the illegal use of corporate funds might give rise to an ultra vires action or in some states an action for breach of fiduciary duty, respondent should be relegated to those state law remedies.[65]

The Supreme Court's decision in the instant case, when considered in conjunction with its recent holdings in *Amtrak* and *Barbour*, clearly indicates a decreasing inclination to imply private actions to redress violations of federal statutes. The Court's four factor test, while containing familiar principles, had never been used in such a comprehensive fashion. Indeed, this newly created test may prove insurmountable to plaintiffs seeking private remedies. The test seemingly requires that Congress enact a statute creating a federal right in the plaintiff, intending to provide a personal remedy to effectuate its purpose and merely neglecting to do so. Reasonable prognostication cannot envision this situation arising even infrequently. The severity of the test's impact could, however, hinge on lower court interpretation of specific language in the opinion.[66] The Court prefaced its analysis by stating that "several factors are relevant."[67] While concluding that the plaintiff failed to satisfy any of the factors, the Court failed to indicate whether each was necessary to imply a cause of action or was merely available for consideration. Requiring the plaintiff to be "one of the class for whose *especial* benefit the statute was enacted" has been recognized since *Rigsby* and is arguably necessary to pass muster under standing prerequisites.[68] The presence of legislative intent to create a private remedy and the consistency of implication with congressional purpose proved determinative not only in the instant case, but in *Amtrak* and *Barbour*. Thus, analysis of the development of "implied" remedies and the recent trend of the Court to limit their availability signal that these three "factors" will prove essential. However, any argument as to the essentiality of the fourth factor posed by the Court is less convincing. The Court's unwillingness to "intrude into an area traditionally committed to state law,"[69] was proferred with questionable support and obviously failed to

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[62] 95 S. Ct. at 2089.

[63] *Id.* at 2090.

[64] *Id.* at 2091.

[65] *Id.*

[66] *See, e.g.*, Rauch v. United Instruments, Inc., *summarized in* 44 U.S.L.W. 2149 (E.D. Pa. Sept. 11, 1975) (finding implied action available under Federal Aviation Act).

[67] 95 S. Ct. at 2087.

[68] *See, e.g.*, Association of Data Processing Serv. Organ., Inc. v. Camp, 397 U.S. 150, 153 (1970) (considering whether "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute").

[69] 95 S. Ct. at 2091.

deter the Court's implication of private remedies in *Borak* and *Bivens*.[70] The Court distinguished *Borak* from the instant case, pointing out that no implied remedy was necessary to effectuate the congressional purpose of section 610.[71] This indicates that while appropriate to the instant case, relegation to state law remedies would not be compulsory if, as in *Borak*, private action was justified in light of congressional purpose. In the context of the instant case, one writer has suggested that relegation of corporate shareholders to an "ultra-vires" action at state law requires re-examination of the ultra vires doctrine.[72] The import of a unanimous decision, while not conclusive, will surely temper speculation among lower courts as to the absolute nature of the Court's unique test and curtail the heretofore ad hoc decisional approach. Beyond any speculative restriction of implied causes of action, the instant case places the onus of enforcing the Corrupt Practices Act squarely on the Justice Department. The history of section 610 has been one of nonenforcement[73] and recent disclosures of corporate violations point to the statute's lack of deterrent effect.[74] With the preclusion of private actions, the federal goal of eliminating corporate political contributions can be attained only through comprehensive, nondiscriminatory enforcement by federal authorities. In fact, apparent deference to the separation of powers principle and a hesitancy on the part of the Court to legislate[75] or to infringe upon the prosecutorial discretion of the Attorney General[76] may claim partial credit for this decision. A final and perhaps more immediate result of the instant case will be to decrease the federal case load. In the context of implied remedies, Justice Blackmum expressed his concern over a mounting case load in *Bivens*.[77] However, a bare majority of the Court share this concern,[78] and the unanimous approval in the instant case seems to indicate that it was not a case load decision. The current trend of the Court to restrict private causes of action,[79] evidenced further by the instant case, seemingly places vindication of individual

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[70] See text accompanying notes 25 through 29 & 44 through 47 *supra*.

[71] 95 S. Ct. at 2091.

[72] *See* Comment, *Civil Responsibility for Corporate Political Expenditures*, 20 U.C.L.A.L. REV. 1327 (1973).

[73] *See generally* E. EPSTEIN, *supra* note 60, at 15-18; Lambert, *Corporate Political Spending and Campaign Finance*, 40 N.Y.U.L. REV. 1033, 1041 n.38 (1965).

[74] *See generally* Comment, *Corporate Campaign Funding*, 4 CUMBER.-SAM. L. REV. 544, 544 n.1 (1974).

[75] *See, e.g.*, Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 411-12 (1971) (Burger, C.J., dissenting); Wheedlin v. Wheeler, 373 U.S. 647, 652 (1963).

[76] *See generally* Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81 (2d Cir. 1972); Smith v. United States, 375 F.2d 243, 246-48 (5th Cir.), *cert. denied*, 389 U.S. 841 (1967); United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965).

[77] Bivens v. Six Unknown Named Fed. Narcotics Agents, 403 U.S. 388, 430 (1971) (Blackmum, J., dissenting).

[78] *See generally* COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES; RECOMMENDATIONS FOR CHANGE 172-88 (1975).

[79] *See* Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975); National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

rights in the hands of bureaucratic administrative agencies and political appointees. While in some instances an action under state law would provide an adequate remedy, in the context of the instant case, inconsistent state court decisions could thwart the federal policy of precluding corporate political influence through financial contributions. Such a result is not to be desired but is now, perhaps, inescapable.

William Norman Reed

BOOK REVIEWS

THE UNITED STATES AND INTERNATIONAL OIL
BY ROBERT B. KRUEGER.*
New York: Praeger Publishers. 1975. Pp. 384. $8.50.

*John M. Kuykendall, Jr.***

Subtitled "A Report for the Federal Energy Administration on U.S. Firms and Government Policy," this study was funded by the FEA in response to the 1973-1974 Arab oil embargo. Although the study does not purport to endorse any of the "various options" outlined, it advocates the establishment of controls so that the United States Government "has informational access and an ability to assert its presence." Government review of supply arrangements with power to approve or disapprove is suggested for study. The author rejects (1) removal of tax incentives by the United States alone, (2) regulation of oil companies as public utilities, (3) arbitrary limitation of petroleum imports, and (4) creation of a government owned petroleum corporation.

The author contends that consumer countries and their petroleum companies are now forced to deal with a self-acknowledged cartel, so no purpose is served on the international level by requiring the same competitive performance of such companies that is expected domestically.

In a section entitled "short history of the system," the author observes that from 1859 through the end of World War I the United States was the world's largest petroleum producer, with the exception of a few years when Russian production was bigger. By the end of that war the demand for petroleum created fears of an oil shortage in the United States. The British had so effectively tied up supplies in Iran and Iraq and the Dutch had done so for Shell in Indonesia that our domestic oil companies sought and obtained the aid of the United States Government to gain entry into these and other areas. This country's "Open Door Policy" requiring reciprocity for mineral leasing in the United States finally broke the barriers, and Exxon, Gulf, Texaco, and other major domestic oil companies began significant operations in these countries, South America, and other foreign countries by the end of the 1920's.

The author further notes that the scare of an oil shortage was replaced by the problem of overproduction and cheap prices. The United States Government took the positions that there were no constitutional grounds upon which it could regulate drilling and conservation was a matter for the states. The interstate oil compact, an agreement among oil producing states, was signed in 1935. The major oil companies attempted to avoid overproduction and "destructive competition" in world markets, but the antitrust laws made domestic agreements of this type impossible. Surplus continued to develop with such discoveries as the East Texas field, and the price of petroleum fell from $1.30 per barrel in 1930 to 24 cents a barrel in 1931.

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During World War II the King of Saudi Arabia demanded and received large sums of funds from the United States, at first indirectly from Britian's lend-lease funds, later directly when President Roosevelt declared the defense of Saudi Arabia vital to the defense of the United States, Secretary of the Interior Ickes advocated the government itself acquire Saudi Arabia's oil concession but Congress balked, and governmental policy thereafter was to assist domestic companies in gaining access to the petroleum in the Persian Gulf. With the failure of the Senate to ratify the Anglo-American Oil Agreement of 1944, which would have established an international petroleum commission, the United States Government thereafter left the control and supervision of the international petroleum system to multinational petroleum companies.

The multinational petroleum companies competed for concessions among themselves and with foreign governments, including Russia. In 1953 President Truman directed the Department of Justice to discontinue criminal investigations under the antitrust laws and substitute civil suits, recognizing that the major oil companies' activities in the Middle East were an important objective of American foreign policy.

The more petroleum the companies produced in the foreign countries, however, the more demand for a part of the action (royalty, taxes, and finally ownership), and then there was OPEC, the Organization of Petroleum Exporting Countries. Today these multinational petroleum companies occupy a hostage position in the producing countries, and OPEC has accomplished what they previously tried but could not do—the elimination of cheap prices for petroleum. The study offers no hope of return to cheap petroleum prices.

The book's foreword, dated March 25, 1975, concludes that the developments of the last 4 years have radically transformed the international petroleum system and it is essential that the United States develop both an international and a domestic energy policy. The continuing inability of the executive and congressional branches of the federal government to start even reaching agreement on a domestic energy policy gives little hope that it can effectively regulate or even cope with the international petroleum system. In this reviewer's opinion, no regulation at all, for both the domestic and international petroleum systems, is unquestionably better than the wrong regulation. A real test to determine our government's ability to start resolving these energy problems is the matter of revising the antitrust laws to remove the conflicts pointed out by this study.

THE VICTIMS
BY FRANK G. CARRINGTON.
New Rochelle, N. Y.: Arlington House. 1975.
Pp. 326. $9.95.

*The Honorable Peter Halat**

Frank G. Carrington is an attorney who has spent much of his professional life as a police advisor. *The Victims*, more than anything, reflects the position hard-line "law and order" advocates have taken relative to the United States Supreme Court decisions in the criminal law field over the past 20 years, or during the era known as the Warren Court. It is, I think, fair to say that this book is an indictment of the criminal justice system in the United States. It is, however, in this reviewer's opinion, an unfair indictment.

The author attempts to blame the criminal justice system for the rising crime rate. When he refers to the criminal justice system, he means only the court system. Apparently he has researched many, many criminal cases over the past 20 years and has picked those that best suit his purpose. His purpose seems to be an attempt to prove that a person who once commits a crime will repeat the crime if given an opportunity to do so; that is, if a person who commits a crime is convicted, sent to the penitentiary, and ultimately released, either by parole or completion of the sentence, he will again commit the same or some similar crime. Such reasoning can only lead to one conclusion: In order to keep a person from repeating a crime, he should remain in a penal institution for the rest of his life. This conclusion, of course, is the antithesis of what our penal reform system is supposed to accomplish. To this writer, it seems incredible to assert that the solution to the rising crime rate in the United States would be to incarcerate permanently every person who commits a crime. In an enlightened society, the primary purpose of detention after crime should be rehabilitation. Carrington's argument is that it cannot be determined whether a criminal is rehabilitated, and a calculated risk is taken by releasing that person back into society. If the released person never commits another crime he will not receive newspaper headlines. If he does repeat the crime or commits another crime, however, the matter is widely reported in the news, and you may be sure that the history of his past criminal record will be cited.

The solution advocated by Carrington is permanent detention and the reinstatement of the death penalty. This is justified, he says, because of the plight of the victims of the crime. Quoting from the preface to the book:

> Central to the premise of the book is that the victim's rights can be recognized and protected without doing violence to concepts of fundamental fairness to the accused and of fundamental humanity to the convicted criminal. All that is called for herein is a balance between the rights of the law-abiding and the rights of the criminal accused. Today no such balance exists. Until it does, the victims will continue to be, as they are described in chapter one, "uncertain, unnamed, and unrepresented."

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As one bears in mind Carrington's statement that the rights of victims can be protected without doing violence to the concepts of fundamental fairness to the accused, one reads the paragraph from the foreword written by United States Senator James Buckley:

> But *The Victims* is more than a story of crime and its victims. It is a thorough, extensively researched indictment of the way in which the American criminal justice system currently operates, a system that in Carrington's words, erects an elaborate thicket of contrived and artificial protections around the criminal accused, but that is unable to secure the rights of non-criminals to go about their business in peace.

One can only assume that the contrived and artificial protections to which Carrington refers are the rights afforded to every citizen, namely, the right to have an attorney represent him, the right *not* to have a confession beaten out of him, the right to a fair trial, etc.

Carrington's call for the reinstatement of the death penalty is based upon a study by the Los Angeles Police Department in 1970-1971. The study, in his words, embraced a compilation of statements by persons arrested for crimes of violence. Those interviewed had been unarmed during the commission of their crimes, had been armed but did not use their weapons, or had carried inoperative weapons. According to the study cited by Carrington, 50.5 percent of those interviewed were deterred by fear of the death penalty from carrying weapons or an operative weapon; 7.07 percent were unaffected by the death penalty because it was no longer being enforced; 10.1 percent were undeterred by the death penalty and would kill whether it was in force or not; 32 percent were unaffected by the death penalty because they would not carry weapons in any event primarily out of fear of being injured themselves or injuring someone else. Further, Carrington uses this argument: First, the execution of A might well deter C, D, and E from following A's example, and second, it will make absolutely certain that A will never kill again. The latter argument cannot be rebutted because if a man is executed certainly he will not commit another crime. But it has never been proven that the execution of one person will deter another person from committing the exact type of crime. The fallacy of the Los Angeles Police Department study is that the answers given to the questions were given after the crime had been committed. Furthermore, we must assume that the answers were given in a controlled situation where the person interviewed had time to reflect upon the crime. There is one disturbing oversight in the entire 326 pages of Carrington's book. The author seems to place no importance upon the arrestee's state of mind as to the possibility of being apprehended during the commission of a crime. Carrington's point of view should be counterbalanced by a more rational, reasonable, and logical viewpoint. Effective law enforcement, in my opinion, is the key to stemming the rise in crime.

LAWYER'S DESK BOOK (4th ed.) by WILLIAM J. CASEY. Englewood Cliffs, New Jersey: Institute for Business Planning, Inc. 1975. Pp. 522. $29.95.

*Thomas R. Ethridge**

Lawyer's Desk Book is exactly what it purports to be: a quick refresher on the law in most general and some specialized fields. Subtitled "The Lawyer's Everyday Instant Answer Book," it covers briefly a gamut of subjects from "Acquiring, merging, selling a business" to "Wills."

Most fields of law encompassing problems which regularly cross the busy general practitioner's desk are enunciated in reasonable detail. For instance, the section on "Landlord and Tenant" law covers 13 pages. Most specialized fields, like "Literary and Artistic Property" which consumes seven pages, deserve and receive shorter treatment. Yet enough information on more concerning topics such as patents and copyrights is available for the client's first office visit with the general practitioner.

The publisher's editorial staff suggests that the checklists contained under each heading are handy for a lawyer to pursue while the client is waiting in the reception room or even while the client is with the lawyer. Although more time and greater attention to the client may be required at those times, the appropriate information is helpful reading before the client arrives if the lawyer knows generally the client's problem.

The 70-page appendix is useful for those who have need of the law of all or some of the states concerning such things as creditor's remedies, estates and trusts, tax rates, etc. This information is presented mainly in chart form, as is other useful information concerning federal taxes.

Lawyer's Desk Book will cause the beginning lawyer to feel a lot better about the impression that he may make on the client when first conferring about a matter of which he has little knowledge. The young lawyer may also be able to impress the senior partner with his knowledge in a certain field if he has a few minutes to look at this book before meeting with the senior partner. Here, also, it is a very useful tool for the experienced practitioner, particularly in specialized areas in which he is inexperienced.

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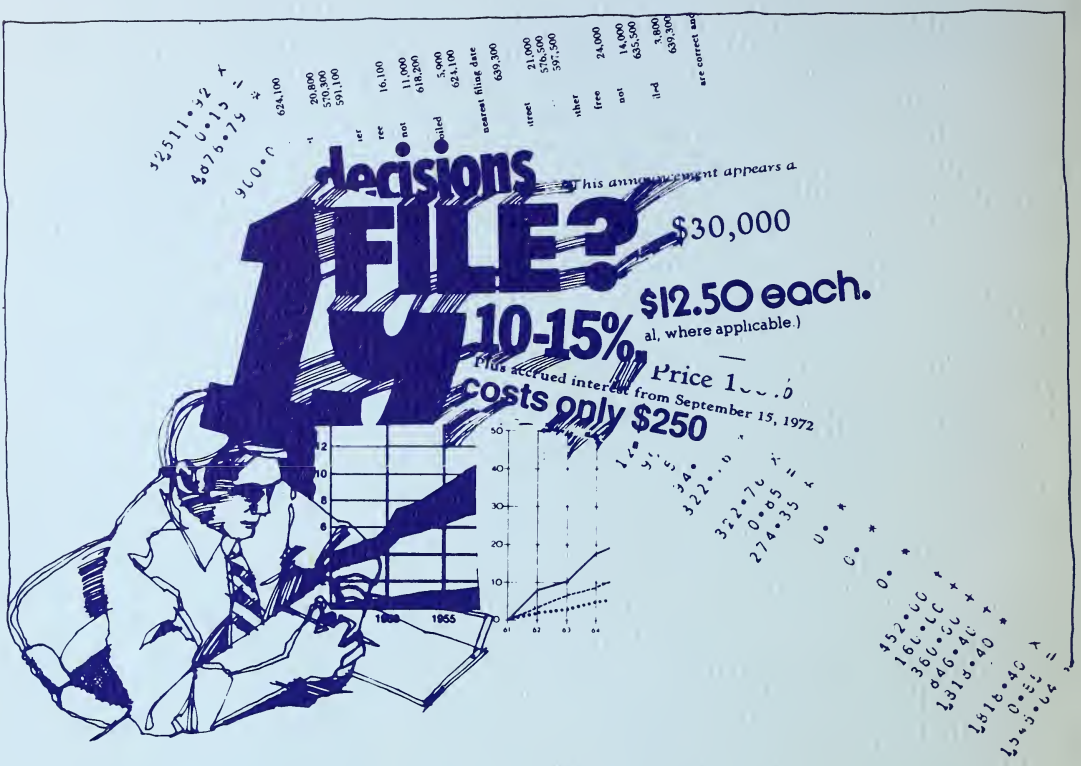

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